Kentucky Law Journal

Volume 32 | Issue 3 Article 4

1944

Some Factors to Be Considered in Distinguishing Preparation from the Overt Act in Criminal Attempts

John J. Yeager
University of Kentucky

STUDENT NOTES

SOME FACTORS TO BE CONSIDERED IN DISTINGUISHING PREPARATION FROM THE OVERT ACT IN CRIMINAL ATTEMPTS

An attempt to commit a crime is made up of three elements: (1) the specific intent to commit a crime, (2) an overt act amounting to more than mere preparation, and (3) failure to consummate the crime. The question to be discussed here is what are some of the factors to be taken into consideration in determining what acts on the part of one accused of a criminal attempt can be said to be overt acts which are sufficient to sustain a conviction. Whether the acts of any particular defendant constitute an attempt is to a large extent a question of degree. He must have carried his plan far enough so that it can be said that he has not merely been preparing to commit the crime, but that he has done some act or acts toward the actual commission of the crime.[1] Since the dividing line between preparation and the attempt itself has never been definitely located, the courts have resorted to the application of broad principles to the facts in each individual case. This has led to much confusion in borderline cases, different courts reaching different results under similar facts. A study of borderline cases shows that factors other than the extent of the act itself are often taken into consideration in determining whether an attempt has been committed or not.

For example, the nature of the crime which the defendant has attempted is an important factor to be considered. Under a particular set of facts a defendant might be convicted of an attempt to commit arson, whereas one who has gone correspondingly as far toward committing murder might not be convicted. It is logical that a different result might be reached, as the crimes of attempted arson and attempted murder are as different as the crimes of arson and murder themselves.

An illustration of this can be had by comparing the cases of *State v. Davis*[3] and *Commonwealth v. Peaslee*,[4] the former a prosecution

[1] Broadhead v State, 24 Ala. App. 576, 139 So. 115 (1932), Milner v State, 18 Ala. App. 157, 89 So. 306 (1921) People v Anderson, 1 Cal. App. (2d) 687, 37 P (2d) 67 (1934), People v Gilbert, 86 Cal. App. 8, 260 Pac. 558 (1927) People v Lanzit, 70 Cal. App. 498, 233 Pac. 816 (1925), West v Commonwealth, 156 Va. 975, 157 S. E. 538 (1931)

Compare McDowell v State, 19 Ala. App. 532, 98 So. 701 (1924) Gustine v State, 86 Fla. 24, 97 So. 207 (1923), Coffee v State, 39 Ga. App. 664, 148 S. E. 303 (1929), and Dill v State, 149 Miss. 167, 115 So. 203 (1928) with People v. Lombard, 131 Cal. App. 525, 21 P (2d) 94 (1933), Hammond v State, 47 Ga. App. 795, 171 S. E. 559 (1933), Cunningham v State, 48 Miss. 685 (1874), and State v Thomason, 23 Okla. Cr. 104, 212 Pac. 1026 (1923)

[3] 219 Mo. 1222, 6 S. W (2d) 609 (1928)

[4] 177 Mass. 267, 59 N. E. 55 (1901)

for attempted murder and the latter a prosecution for attempted arson. In the case of *State v. Davis,* the defendant hired another to kill an enemy He planned the method to be followed, furnished the killer with a picture by which he could identify the victim, and made arrangements with the victim's wife to get the victim to the place where he was to be killed. The failure of the hireling to carry out the plan was the only thing that prevented the crime from being consummated. The court ruled that the defendant had committed no overt act, and that no attempt had been committed. Compare the facts of this case with those of *Commonwealth v. Peaslee,* in which an opposite result was reached. In this case the defendant arranged combustible material in a building in such a way that it could be set on fire by a candle placed in a pan of turpentine. He attempted to induce another to go into the building, place the candle in position, and light it. The other refused. It was held that an attempt to commit arson had been committed, and that the acts of the defendant were sufficient to constitute an overt act. What facts existed in the *Peaslee* case, but not in the *Davis* case. which caused one court to hold that an attempt had been committed, while the other court reversed a conviction for attempt? In the *Davis* case, the defendant had completed all the steps necessary to carrying out his plan. All that remained to be done was the actual killing. The defendant in the *Peaslee* case did no more than this. The reason for the different results is not in the difference in the acts. The only material difference is in the crimes themselves. The inference to be gathered is that in proving an attempt to commit arson, it is not necessary to show acts coming as close to actual commission as is necessary in a prosecution for attempted murder.[5]

In the case of *Commonwealth v. Kennedy,*[6] Justice Holmes makes a similar suggestion in regard to the remoteness of the act of the defendant from the actual consummation of the crime. Holmes suggests that the gravity of the crime is a controlling factor, and that acts which are more remote from actual consummation might constitute an attempt to commit serious crime, while an attempt to commit a lesser crime will require a closer proximity to consummation. He suggests, further, that convictions of attempts to commit crimes that are greatly feared will be sustained upon proof of acts which are comparatively remote from actual consummation.

Another important factor to be considered in borderline cases is the matter of proof of specific intent. Specific intent must be shown before an attempt can be made out. Where intent can be shown from

[5] See Hicks v Commonwealth, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891 (1889), Manner v State, 43 Ga. App. 772, 159 S. E. 902 (1931)

[6] 170 Mass. 18, 48 N. E. 770 (1897).

Miller v State, 130 Miss. 730, 95 So. 83 (1923), Merritt v Commonwealth, 164 Va. 653, 180 S. E. 395 (1935) Thacker v Commonwealth, 134 Va. 767, 114 S. E. 504 (1922), State v Cass, 146 Wash. 585, 264 Pac. 7 (1928).

some source other than defendant's acts, the question of proof of intent is not important for our discussion here. But where intent must be shown by inference from the acts of the defendant, the question of proof of intent will in some cases be very material. Here the acts of the defendant must serve two functions; they must fulfill the requirement of an overt act and must also be so unequivocal that intent can be inferred from them. Of these two functions the latter will in most cases be the more difficult to fill. If the defendant has done acts which definitely show that he has the specific intent to commit a crime, such acts are almost always done not in mere preparation, but in the actual commission of the crime itself. Such acts will fulfill the requirement of an overt act as well as prove intent. However, the converse of this proposition is not necessarily true. Acts which will meet the overt act requirement will not necessarily be acts from which specific intent can be inferred.

On this point see *State v. Cass*[8] and *Jones v. State*,[9] two cases with similar facts which reach different results. Both are prosecutions for attempted burglary In the *Cass* case the defendant went to the door of an apartment and rattled the doorknob. In the *Jones* case, the defendant went onto the porch of a dwelling house and rattled a window The acts in one case seem to have gone no farther toward consummation of the crime of burglary than the acts in the other. The difference is that in the *Cass* case it was shown from the fact that the defendant had burglar's tools in his possession that he had the intent to commit the crime of burglary while in the *Jones* case there was nothing except the defendant's act in rattling the window from which intent could be inferred. It seems likely that if specific intent had been shown in the *Jones* case from evidence other than the acts of the defendant, a conviction would have been sustained.

This tendency of the courts in a close case to take into consideration other factors in determining whether there is an overt act which is sufficient to sustain a conviction accounts for much of the confusion which exists today in the law of attempts. A court cannot look at the defendant's acts alone and say whether an attempt has been committed. It must take into consideration all of the circumstances surrounding the crime. The act must be considered in the light of the nature of the crime, the proof of specific intent, and perhaps other factors which might enter into individual cases. As long as this is so, different courts will disagree as to what acts constitute an attempt. No single rule can be set up which will determine in all case whether or not an attempt has been made. Of course, in the majority of cases the act itself will be so clearly an overt act or no overt act that it alone will be the determining factor. But in the borderline cases, those that give the courts the most trouble, the act must be considered

[8] 146 Wash. 585, 264 Pac. 7 (1928)
[9] 172 Miss. 597, 161 So. 143 (1935)

in the light of all the circumstances surrounding the crime in order to determine whether or not it is an overt act.

JOHN J. YEAGER

THE OVERT ACT IN CRIMINAL ATTEMPTS

Webster defines an attempt as an undertaking or an unsuccessful effort.[1] This definition implies first, an intention to do some particular act; second, an act or acts which are calculated to effect a realization of this intention; and third, a failure to accomplish the intended act. The word attempt, as used to designate a branch of criminal law, has the same meaning as when used in ordinary speech. Thus, a criminal attempt requires specific intent to commit a crime, an overt act moving directly toward the commission of the crime, and a failure to consummate the crime. The problem to be considered here is the nature of the required overt act.

That there must be some overt act leading directly toward the commission of the intended crime is not questioned. While specific intent is a necessary, and perhaps the most important, element to be proved in a prosecution for criminal attempts, proof of intent alone does not make out a crime.[3] But specific intent must of necessity often be proved from the acts of the accused, and in many cases it cannot be inferred from any acts except those moving directly toward consummation of the crime. This seems to have given rise to an erroneous assumption that wherever intent can be shown from the acts of the accused, an attempt has been committed, and courts have at times sustained a conviction where intent was shown from mere preparation. In the case of *People v. Lombard*[4] it was shown that the defendants intended to kidnap someone. They prepared a place to hide the victim, procured ropes and gags, and drove out to the victim's home. One of the defendants scouted around and found that the police were watching the house. The defendants made no move toward actually kidnapping anyone; however, the court held that these preparations were enough to constitute an attempt. A similar holding is found in *Cunningham v. State,* in which the court held that possession of blank warrants of the state, seals, and a stamp of the state

[1] Webster's New International Dictionary (2d ed. 1935).

[2] Broadhead v State, 24 Ala. App. 576, 139 So. 115 (1932), Tharpe v State, 23 Ala. App. 193, 122 So. 698 (1929) Miller v. State, 130 Miss. 730, 95 So. 83 (1923) Meritt v Commonwealth, 164 Va. 653, 180 S.E. 395 (1935), West v. Commonwealth, 156 Va. 975, 157 S.E. 538 (1931), Thacker v Commonwealth, 134 Va. 767, 114 S.E. 504 (1922)

[3] McDowell v State, 19 Ala. App. 532, 98 So. 701 (1924), Coffee v. State, 39 Ga. App. 664, 148 S.E. 303 (1929), Dill v State, 149 Miss. 167, 115 So. 203 (1928), State v. Addor, 183 N.C. 687, 110 S.E. 650, 22 A.L.R. 219 (1922) Lovett v. State, 19 Tex. 174 (1857)

[4] 131 Cal. App. 525, 21 P (2d) 94 (1933).

[5] 49 Miss. 685 (1874).