View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 32 | Issue 3 Article 5

1944

The Overt Act in Criminal Attempts

John J. Yeager
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Yeager, John J. (1944) "The Overt Act in Criminal Attempts," *Kentucky Law Journal*: Vol. 32 : Iss. 3 , Article 5.
Available at: https://uknowledge.uky.edu/klj/vol32/iss3/5

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

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).

auditor's signature, with the intent to forge warrants of the state was sufficient to constitute an attempt to forge. Compare these two cases with *Dill v. State*,[6] which held that the possession of a still and several barrels of mash was not enough to constitute an attempt to manufacture liquor, even thought intent was admitted, and with *People v. Miller*,[7] which held that proof that the defendant came into the presence of one whom he had threatened to kill and proceeded to load a rifle which he was carrying under his arm was not enough to sustain a conviction for attempted murder. The latter two cases represent the accepted rule, that there must be more than mere preparation to constitute an attempt, even where intent is shown.

In the case of *People v. Gilbert*[8] the court said that although mere intent is no offense, if the defendant has acted in such a manner that intent could be inferred from his acts, an attempt has been committed. This language is likely to be misleading, as it leaves the impression that once intent has been conclusively proved, a conviction for attempt would be proper. However the rule of the *Gilbert* case as applied in *People v. Miller*[9] does not result in a conviction for intent alone. In this case acts from which intent can be inferred are defined as acts directly and unequivocally done in the commission of the crime. While the court seems to make intent the all important element to be proved in making out an attempt, it will not sustain a conviction unless in addition to intent there is an overt act moving directly toward consummation. There are also cases which hold that once intent is established, slight acts on the part of the defendant will constitute an attempt.[10] An examination of these cases shows that the slight acts required are acts which move directly toward the commission of the crime, in other words, overt acts. What is probably meant by such language is that if intent is shown, any overt act will constitute an attempt, whereas if intent must be proved from the defendant's acts, there must be acts moving directly toward consummation which unequivocally show the intention to commit a crime.

In those cases where the defendant is apprehended while he himself is engaged in direct, unequivocal acts which would, if he had been allowed to complete them, have resulted in the consummated crime, there is no doubt that he is guilty of an attempt.[11] In such a case an overt act can easily be shown. Cases presenting the most

[6] 149 Miss. 167, 115 So. 203 (1928)
[7] 2 Cal. (2d) 527, 42 P (2d) 308, 98 A.L.R. 913 (1935)
[8] 86 Cal. App. 8, 260 Pac. 558 (1927)
[9] 2 Cal. (2d) 527, 42 P (2d) 308, 98 A.L.R. 913 (1935)
[10] People v Anderson, 1 Cal. App. (2d) 687, 37 P. (2d) 67 (1934), Dill v State, 149 Miss. 167, 115 So. 203 (1928)
[11] People v Lanzit, 70 Cal. App. 498, 233 Pac. 618 (1925) People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922), State v Roby, 94 Iowa 1032, 188 N.W 709 (1922) Alford v Commonwealth, 240 Ky 513, 42 S.W (2d) 711 (1931), State v Verganadis, 50 Nev 1, 248 Pac. 900 (1926) People v Lawton, 56 Barb. 126 (N. Y. 1867) State v. Cass, 146 Wash. 585, 264 Pac. 7 (1928)

difficulty are those where consummation of the crime depends not on the defendant's acts alone, but on some factor outside the defendant's control, such as the acts of an accomplice or the passage of time. Usually it is not hard to show intent in such a case, but because the defendant plays a more or less passive role in bringing about certain conditions necessary to the commission of the crime it is often impossible to show any physical effort on the part of the defendant toward the commission of the crime itself.

The case of *State v. Davis*[12] presents an illustration of the difficulties which may arise when the consummation of the crime depends solely on the acts of another. In this case the defendant approached one whom he believed to be a criminal and hired him to kill another. The defendant provided him with a picture of the intended victim, outlined to him the plan of the murder, and arranged to have the victim's wife lure him to the spot where he was to be killed. The one whom the defendant had hired to do the killing turned out to be a police officer, and the defendant was arrested after being allowed to carry his plot almost to completion. The court held that here there was no overt act and the defendant was not guilty of an attempt. A similar case is *Hicks v. Commonwealth*,[13] in which the defendant procured some poison and gave it to a servant who was to put it in her master's coffee. The servant disclosed the plot to the police, and the defendant was charged with attempted murder. The court held that here there was no overt act, and the defendant was released. Both of these cases should have been decided differently In the *Davis* case, the acts of the defendant in furnishing the one hired to do the killing with a picture of the intended victim and in having the victim lured to the place where he was to be killed seem clearly to be overt acts moving directly toward the consummation of the crime. If the defendant had done that which his agents had done there would be no question as to his guilt. In the *Hicks* case the giving of poison to one whom the defendant had induced to administer it to the intended victim could be considered as the required overt act. In each case the defendant had done everything possible to bring about the completion of the crime, and was stopped only by the disinclination of his agents to carry out the plot. In such a case the defendant should be held guilty of an attempt, as was held in *Stokes v. State*,[14] a case directly contra to the *Davis* and *Hicks* cases.

It is impossible to set up any absolute rule to determine the dividing line betwen preparation and the attempt itself. Such a rule must be definite enough to establish a guide for determining when an attempt has been committed, yet flexible enough to enable it to be adapted to any set of facts which may arise. If it appears that the defendant is merely arranging the means necessary to enable him to commit the crime he is still in the preparatory stage. But once these

[12] 319 Mo. 1222, 6 S.W (2d) 609 (1928)
[13] 86 Va. 226, 9 S.E. 1024, 19 Am. St. Rep. 891 (1889)
[14] 92 Miss. 415, 46 So. 627, 21 L.R.A (n.s.) 898 (1908)

arrangements are made and the defendant is in a position to commit the crime, then any act which moves directly toward consummation of the crime, no matter how slight, will be an overt act sufficient to constitute an attempt.

From what has been said, it may be concluded that those cases and writers which seem to suggest that all that is necessary to make out a criminal attempt is an act or acts from which intent can be inferred, are overlooking the fact that in this crime, as in others, it is the act, fundamentally which is contrary to the public interest, not the intent. They would leave the impression that the act is valuable only as evidence showing intent, whereas the more logical view and the correct one, is that the act is necessary in itself, not as a means of showing intent, but as one of the basic elements of the crime of attempts.[15]

With this principle in mind, the problem is to discover what is the nature of the required act in attempts. This will naturally depend to a great extent on the nature of the attempted crime. It is suggested that if a number of crimes were broken down into their components, it would be found that in any crime there are certain acts which are essential to every crime of that particular classification, and there are other acts which are merely incidental to this particular crime. The latter may be classed as acts of preparation, whereas the former are acts which, if not successful, will constitute an attempt. For example, in the crime of murder, the essential act is a killing. This is a composite act, made up of other acts, pointing a gun at the victim, pulling the trigger, the explosion of the powder, the flight of the bullet, the bullet striking the deceased in a vital spot. Any other act is merely incidental, the necessity of it arising out of the peculiar circumstances surrounding any particular murder. The performance of any of these incidental acts is classed as preparation, since the purpose of these acts is to prepare the way for the essential act, killing the deceased, and the performance of any of these acts would not constitute an attempt. It would take one of those acts which go to make up the essential act to make an attempt, but once the first of these acts has been performed the attempt has been committed. Thus if A walks into B's office, armed with a shotgun, and announces his intention to kill B, no attempt has been made, since none of those acts which go to make up the essential act have been performed. A now loads the gun. Still no attempt has been committed. A now raises the gun so that it is aimed at B. This is the first of those acts which go to make up the act of killing B. This is, therefore, the required overt act and an attempt has been committed.

JOHN J. YEAGER

[15] This does not mean that the act has no value in showing specific intent. Intent must often be inferred from acts. However, proof of intent is not the only reason an act must be shown.