IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1088

Filed: 20 June 2017

Transylvania County, Nos. 15 CRS 38, 50221

STATE OF NORTH CAROLINA

v.

DARRELL LEE MELTON

Appeal by defendant from judgments entered 21 April 2016 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Tulchin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant.

DIETZ, Judge.

On 3 February 2015, Defendant Darrell Lee Melton met a hitman in the parking lot of a Walmart and paid him $10,000 to kill his ex-wife. Fortunately for the victim, the hitman was not a hitman; he was an undercover SBI agent. Shortly after Melton paid for the hit, law enforcement arrested him and charged him with

attempted first degree murder and solicitation of first degree murder. A jury convicted Melton on both charges.

On appeal, Melton argues that there was insufficient evidence to convict him of attempted murder and that sentencing him for both attempted murder and solicitation to commit murder violated the Double Jeopardy Clause. As explain below, we reject both arguments. The State presented substantial evidence of all the elements of attempted first degree murder, including evidence of an overt act calculated to carry out the murder. Moreover, attempted first degree murder and solicitation of first degree murder each require proof of at least one element the other does not—meaning one can be convicted of and sentenced for both offenses based on the same underlying acts. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

In 2014, Darrell Lee Melton contacted an old acquaintance, Lawrence Sorkin, to talk about an ongoing custody dispute between Melton and his ex-wife. The two men met in January 2015. Based on their conversation, Sorkin believed Melton wanted help finding someone to murder his ex-wife. Sorkin reported the conversation to the Transylvania County Sherriff's Office.

Sherriff's deputies instructed Sorkin to contact Melton and seek clarification on Melton's intentions. During a phone call and subsequent meeting with Sorkin,

Melton expressed his distrust of the court system and desire to have sole custody of his daughter and indicated that he wanted to hire someone to help him.

After the meeting, Sorkin called Melton to say that he had arranged a meeting with a "resource" who could help Melton. Sorkin told Melton that the resource needed $2,500 as a down payment at the meeting and another $7,500 when the job was done.

SBI Agent Randy Wood went undercover to pose as the "resource"—i.e., the hitman. Agent Wood met Melton on 3 February 2015 in a Walmart parking lot. When Melton approached Agent Wood's car, the agent instructed Melton to do various things that one might associate with a trained and experienced hitman, such as asking Melton to put on gloves before getting into the car to avoid leaving fingerprints. Melton then provided Agent Wood with information about his ex-wife, including her name, home address, and phone number. Melton also gave Agent Wood photographs of his ex-wife and told him the make, model, and color of her car.

Melton also provided Agent Wood with the name of his daughter's elementary school and told him about his ex-wife's daily routine. Agent Wood asked Melton what he wanted to be done with the body. Melton said that he did not want "any bodies moved."

Melton then suggested that the murder be done while his daughter was at school and that Thursday would be a good day to do the job because it was a half day of school. Melton told Agent Wood that he did not care how the murder was

accomplished or about any other details. Agent Wood asked Melton if he would have any problems coming up with the remaining $7,500, and Melton told Agent Wood that he had all of the money with him. Melton then handed Agent Wood $10,000 and confirmed that he wanted the job done on Thursday. After handing over the money, Melton got out of the car and walked away. Law enforcement arrested Melton a short time later.

The State indicted Melton for attempted first degree murder and solicitation to commit first degree murder. The jury convicted Melton on both charges, and the trial court sentenced him to 157 to 201 months in prison for attempted murder and a consecutive sentence of 58 to 82 months in prison for solicitation. Melton timely appealed.

Analysis

I. Sufficiency of the Evidence

Melton first argues that the trial court erred by denying his motion to dismiss the attempted murder charge. He contends that the State presented no evidence that he committed an overt act, which is a necessary element of attempted murder. As explained below, we hold that the State presented sufficient evidence of an overt act to permit the case to go to the jury.

"In reviewing a motion to dismiss based on the sufficiency of the evidence, the scope of the court's review is to determine whether there is substantial evidence of

each element of the charged offense." *State v. Hardison*, __ N.C. App. __, __, 779 S.E.2d 505, 507 (2015). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "The evidence must be considered in the light most favorable to the State as the State is entitled to every reasonable inference that might be drawn therefrom." *Hardison*, __ N.C. App. at __, 779 S.E.2d at 507.

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). The "overt act" required for attempt "must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." *State v. Parker*, 224 N.C. 524, 525, 31 S.E.2d 531, 531 (1944), *overruled in part on other grounds by State v. Hageman*, 307 N.C. 1, 296 S.E.2d 433 (1982). "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 525–26, 31 S.E.2d at 531–32.

We hold that the State presented substantial evidence of an overt act. Melton hired another man to kill his ex-wife. He did so by providing details to ensure that the killer could carry out that act, including his ex-wife's name, phone number, and daily routine; a photograph of her; and a description of her car. Melton gave the man a specific day to carry out the murder and even discussed what to do with the body. Finally, Melton gave the man $10,000 to pay for the murder. He then got out of the man's car and walked away, believing the murder would be carried out.

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. Melton provided the killer with everything he needed to complete the job, including key information on the target and the money to pay for the deed. In short, Melton took a key "step in a direct movement towards the commission of the offense[.]" *Id.* at 526, 31 S.E.2d at 531–32. We thus hold that the State presented substantial evidence of the overt act element of the offense.

We also observe that our holding is consistent with those in other jurisdictions, which uniformly hold that, although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by Melton here, can satisfy the elements of attempted murder. *See, e.g.*, *State v. Mandel*, 278 P.2d 413, 416 (Ariz. 1954); *People v. Superior Court* (*Decker*), 157 P.3d 1017, 1024 (Cal. 2007); *Howell v. State*, 278 S.E.2d 43, 46 (Ga. Ct. App. 1981); *State v. Montecino*,

906 So. 2d 450, 454 (La. Ct. App. 2005); *State v. Group*, 781 N.E.2d 980, 996 (Ohio 2002).

Accordingly, we hold that the State presented sufficient evidence of each element of the offense of attempted first degree murder and the trial court therefore properly denied Melton's motion to dismiss.

II. Double Jeopardy

Melton next argues that the trial court violated the Double Jeopardy Clause by refusing to arrest judgment on his solicitation conviction because it was based on the same conduct as his attempted murder conviction. As explained below, solicitation to commit murder and attempted murder are separate offenses with distinct elements. Accordingly, the trial court did not err by refusing to arrest judgment on Melton's solicitation conviction.

The Double Jeopardy Clause of the Fifth Amendment protects against multiple punishments for the same offense. *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997). The Double Jeopardy Clause is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

Where, as here, "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the

other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Fernandez*, 346 N.C. at 19, 484 S.E.2d at 361–62. This test focuses on the distinct elements of the two crimes, not whether the same facts could satisfy those distinct elements. *State v. Jackson*, 189 N.C. App. 747, 752, 659 S.E.2d 73, 77 (2008).

Applying *Blockburger* and its progeny here, we find no Double Jeopardy violation. Solicitation to commit a first degree murder and attempted first degree murder are separate statutory offenses. N.C. Gen. Stat. §§ 14–2.5, 14–2.6; *State v. Tyner*, 50 N.C. App. 206, 207, 272 S.E.2d 626, 627 (1980). The elements of solicitation to commit first-degree murder are that "defendant counseled, enticed, or induced another to commit each of the following: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation." *State v. Crowe*, 188 N.C. App. 765, 769, 656 S.E.2d 688, 692 (2008). The elements of attempt to commit first degree murder are: "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000).

Each of these two offenses "requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. "Attempt, unlike solicitation, requires an overt act." *State v. Clemmons*, 100 N.C. App. 286, 290, 396 S.E.2d 616, 618 (1990). Solicitation,

unlike attempt, requires "enticing or inducing" another to commit a crime. *Tyner*, 50 N.C. App. at 207, 272 S.E.2d at 627. Thus, although the same set of facts formed the basis for Melton's convictions and sentences on both of these criminal offenses, the Double Jeopardy Clause is not implicated because the offenses each have elements distinct from the other. We therefore find no error in the trial court's judgments.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).