IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0365-16 & PD-0366-16

MICHAEL JOSEPH BIEN, Appellant

v.

THE STATE OF TEXAS

ON STATE'S AND APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE ELEVENTH COURT OF APPEALS BROWN COUNTY

NEWELL, J., delivered the opinion of the Court in which KELLER, P.J., AND KEASLER, HERVEY, ALCALA, RICHARDSON, KEEL AND WALKER, JJ., joined. YEARY, J., filed a dissenting opinion.

Appellant hired an undercover officer to kill his ex-wife's brother. Based on his efforts in this regard, Appellant was charged with and convicted of two crimes: attempted capital murder and criminal solicitation of capital murder. The court of appeals found that Appellant's convictions on both charges violated the Double Jeopardy Clause's

prohibition against multiple punishments for the "same offense." The court, deeming criminal solicitation the "most serious" offense, upheld that conviction and vacated the conviction for attempted capital murder.[1] We agree with the court of appeals that conviction for these two offenses violated double jeopardy, but disagree with the court of appeals that these offenses each required proof of a different element. Applying the cognate-pleadings test we determine that the elements of the offense of attempted capital murder are functionally equivalent to the elements of solicitation of capital murder. We affirm the court of appeals because we agree that criminal solicitation was the most serious offense.

I. Facts and Procedural History

Appellant and Mickey Westerman grew up in Brownwood and met in junior high. They played sports together and were friends. In 2005, they worked together in the Irving area, and Westerman lived on Appellant's property. Westerman got to know Lori, Appellant's wife. He also met Lori's parents, Gale and Hugh Box, and her brother, Koh Box. Westerman moved back to Brownwood that summer. Between 2005 and 2012 Westerman and Appellant talked on the phone five or six times.

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[1] *Bien v. State*, 530 S.W.3d 177, 183 (Tex. App.—Eastland 2016).

Appellant would call Westerman "out of the blue and he would have some big idea, going to make a million dollars, you know." Westerman said that "receiving a phone call from him, wasn't a surprise. It was, like, just like anybody; here is an old friend calling, you know." But in 2012 Appellant made a different and surprising kind of call: he "told me that he wanted to–the way I understood it from the first phone call, I was gathering that he wanted to have Lori killed." Westerman, encouraged by a friend to "do the right thing," called Lori, who was by then Appellant's ex-wife, and told her "Michael called and–and–and I believe that he is wanting to have you killed. And I don't know how to go about it, so, you need to get with somebody in Pecos and find out what we need to do to–to check this out." Lori notified the Pecos Police, and Chief Clay McKinney shortly contacted Westerman. Westerman told Chief McKinney that he was going to contact Appellant in a few days to make sure he was not just angry and talking "outside of his head."

That wasn't the case. Instead, Appellant made it clear that he wasn't talking about Lori; he was talking about Mr. and Mrs. Box, Gale and Hugh. At this point Texas Ranger Danny Briley began working with Westerman and monitoring his communications with Appellant. Discussion stopped when Appellant was sent to jail for about six months.

But when he was released from jail, Appellant called Westerman and again talked about hiring a hit man. A series of meetings took place–all in a Walmart parking lot.

The first was between Appellant and Westerman on the 27th of November. A friend of Appellant's drove him to the Walmart. Appellant alone got out of his friend's car and got into the passenger side of the undercover vehicle that had been provided to Westerman. The vehicle had been rigged with recording devices. Appellant told Westerman he wanted to kill a member of Lori's family as "fucking flat-ass revenge." He now wanted that member to be Lori's brother Koh Box though "Koh Box never done me no wrong." Appellant told Westerman how he could get the money to pay for the "hit"; he would sell his property or his guns or "cook dope"–something he had learned in jail. "He had all kinds of ways to try to come up with money."

The next meeting was on December 1st. This meeting was between Appellant and Stephen Reynolds, an agent with the Texas Department of Public Safety who posed as a "hit man." This time Westerman drove Appellant to the Walmart, where Appellant alone got out of Westerman's vehicle and into Reynolds's rigged vehicle. Appellant began by asking the agent to kill Koh Box. Reynolds quoted Appellant a $10,000 price for the

hit and said that he would need "some operating funds" up front. Appellant was empty-handed, but he told Reynolds he could come up with some money in about a week. Appellant then went ahead and described Box and his vehicles and business, and drew a map to Box's house. Appellant pressed that he wanted the hit to look like a robbery. Back in Westerman's vehicle on the ride home, Appellant asked for a loan.[2]

The third meeting took place on December 7th, and it is the focus of the indictments in this case. This meeting was between Appellant and the "hit man" Reynolds. Again, Westerman drove Appellant to the Walmart. At the direction of the Rangers, he loaned Appellant $1,000. At the Walmart, Appellant got out of Westerman's vehicle and into Reynolds's vehicle, while Westerman himself went into the Walmart. Appellant gave the $1,000 to Reynolds. After Appellant gave the partial payment to Reynolds, he was arrested and charged with solicitation of capital murder and attempted capital murder. A jury convicted Appellant of both offenses and assessed Appellant's punishment for each offense at confinement for life.

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[2] The State did not argue to the court of appeals that this meeting on December 1st constituted a separate offense of criminal solicitation. Neither does the State make this argument on discretionary review. Consequently, we need not decide that issue as it was not a part of the lower court's decision.

On appeal, Appellant argued that the trial court erred when it authorized the jury to return multiple verdicts for the same offense. Based on its application of *Blockburger*[3] and *Ervin*,[4] the court of appeals agreed. Deeming both offenses, as charged, conduct-oriented, the court held that Appellant's double jeopardy rights were violated when he was punished for both solicitation and attempt for the same conduct—employment of Stephen Reynolds to kill Koh Box.[5] The court upheld the solicitation conviction and vacated the attempt conviction, figuring that, as a 3g crime, solicitation to commit capital murder was the most serious offense.[6] We granted review of the court's holdings that 1) Appellant's convictions on both charges violated double jeopardy, and 2) the remedy for the double jeopardy violation was to affirm the solicitation conviction and vacate the attempt conviction.[7]

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[3] *Blockburger v. United States*, 284 U.S. 299 (1932).

[4] *Ex parte Ervin*, 991 S.W.2d 804 (Tex. Crim. App. 1999).

[5] *Bien*, 530 S.W.3d at 180-83.

[6] *Id*. at 183, (noting that a 3g offense affects parole eligibility and limits a trial court's ability to suspend a defendant's sentence).

[7] We granted both parties petitions. The State's asked,

1. Did the Eleventh Court of Appeals err by holding that convictions for criminal solicitation and attempted capital murder violate double jeopardy when significant factors indicate a legislative intent to punish these offenses as separate steps in the continuum of a criminal transaction?

II. Multiple Punishments for the Same Offense

The Fifth Amendment offers protection against multiple punishments for the "same offense."[8] To determine whether there have been multiple punishments for the same offense, we begin by applying the "same elements" test set forth in *Blockburger*. Under that test, two offenses are not the same if "each provision requires proof of a fact which the other does not."[9] In Texas, we look to the pleadings to inform the *Blockburger* test.[10] If the two offenses have the same elements under the cognate-pleadings approach, then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and the defendant may not be convicted of both offenses.[11] That presumption can be rebutted by a

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2. Assuming a double jeopardy violation, who should determine what the most serious offense is? If this Court answers that question by deciding that a court of appeals should make that determination, what role should the parole consequences of Article 42.12 § 3g have in that analysis when the sentences, fine and restitution are all identical?

And Appellant's petition asked,

1. The Court of Appeals erred when it held that parole eligibility may determine the "most serious" offense for purposes of double jeopardy.
2. What is the proper remedy for multiple punishment when the "most serious" offense cannot be determined?

[8] *Bigon v. State*, 252 S.W.3d 360, 369 (Tex. Crim. App. 2008).

[9] *Blockburger*, 284 U.S. at 304.

[10] *Bigon*, 252 S.W.3d at 370.

[11] *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015).

clearly expressed legislative intent to create two separate offenses.[12] Conversely, if the two offenses, as pleaded, have different elements under the *Blockburger* test, the judicial presumption is that the offenses are different for double-jeopardy purposes and multiple punishments may be imposed.[13] This presumption can be rebutted by a showing, through various factors, that the legislature clearly intended only one punishment.[14]

III. Under the Cognate-Pleadings Approach, the Elements of Solicitation of Capital Murder are Subsumed Within The Elements of Attempted Capital Murder

In this case Appellant hired Reynolds to kill Box. This was alleged as the conduct comprising violations of two separate statutes: criminal solicitation and criminal attempt. According to the court of appeals, these two charged offenses were not the same under the *Blockburger* test because one offense required proof of an element that another does not. As set out by the court of appeals, the allegations in the indictment for

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[12] *Id. See, e.g., Garza v. State*, 213 S.W.3d 338, 352 (Tex. Crim. App. 2007) (noting that Legislature, via Section 71.03(3) of the Penal Code, indicated with sufficient clarity its intention that a defendant charged with engaging in organized criminal activity may also be charged (at least in the same proceeding) with the underlying offense and punished for both).

[13] *Benson*, 459 S.W.3d at 72.

[14] *Id*.

criminal solicitation to commit capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December 2012,
- in Brown County
- with intent that capital murder, a capital felony, be committed
- did request, command, or attempt to induce
- Stephen Reynolds
- to engage in specific conduct
- to-wit: kill Koh Box
- for remuneration, and
- that under the circumstances surrounding the conduct of the defendant or Stephen Reynolds, as the defendant believed them to be, would have constituted capital murder.[15]

The allegations in the indictment for attempted capital murder are:

- Michael Joseph Bien
- on or about the 7th day of December, 2012
- in Brown County
- with the specific intent to commit the offense of capital murder of Koh Box
- did do an act

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[15] *Bien*, 530 S.W.3d at 181.

- to-wit: employ Stephen Reynolds
- by remuneration or the promise of remuneration
- which amounted to more than mere preparation
- that tended but failed to effect the commission of the offense intended.[16]

As the court of appeals noted, to make its attempt case, the State was required to prove that Appellant actually employed Reynolds to kill Box rather than just requesting that he do so.[17] To make its solicitation case, the State was required to prove that Appellant intended that Reynolds commit capital murder by killing Box and that under the circumstances as Appellant believed them to be, killing Box would constitute capital murder.[18]

To determine whether an offense qualifies as a lesser-included offense, we employ the cognate-pleadings approach.[19] Under this approach, elements of a lesser-included offense do not have to be pleaded in the indictment if they can be deduced from the facts alleged

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[16] *Id.*

[17] *Id.* at 181-82.

[18] TEX. PEN. CODE. § 15.03.

[19] *State v. Meru*, 414 S.W.3d 159, 162 (Tex. Crim. App. 2013).

in the indictment.[20] In such situations, the functional-equivalence concept can be employed in the lesser-included-offense analysis.[21] When utilizing functional equivalence, the court examines the elements of the lesser offense and decides whether they are "functionally the same or less than those required to prove the charged offense."[22]

Here, the act alleged as amounting to "more than mere preparation" under the criminal attempt indictment was the employment of Reynolds to kill Koh Box. This was the same act alleged in the criminal solicitation indictment. To the extent that criminal attempt required a showing of an employment agreement, the act of soliciting that employment in the criminal solicitation indictment was subsumed within the elements necessary to prove criminal attempt under these indictments.

Similarly, both indictments required proof of the intent to commit the offense of capital murder. Criminal solicitation carries with it the requirement that the State prove Appellant believed the conduct he was soliciting would constitute capital murder. Under the pleadings in this case, the State was required to prove that Appellant believed the conduct

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[20] *Ex parte Watson*, 306 S.W.3d 259, 273-74 (Tex. Crim. App. 2009) (opin. on reh'g).

[21] *McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010).

[22] *Id.* (citing *Farrakhan v. State*, 247 S.W.3d 720, 722-23 (Tex. Crim. App. 2008)).

he was soliciting constituted capital murder. But this element was also subsumed within the greater proof in both offenses that Appellant intended that Reynolds commit capital murder. In this regard the "belief in the circumstances surrounding the conduct" aspect of criminal solicitation is the functional equivalent of the intent to commit capital murder in attempted capital murder.

Finally, the criminal solicitation indictment also required proof that, under the circumstances as Appellant believed them to be, the conduct solicited actually would constitute capital murder.[23] Arguably, this would require the State to prove that the offense solicited was not legally impossible, as the statute could be read to require proof of what the actor intends, but also proof that the circumstances surrounding the conduct the actor intends actually constitutes a criminal offense.[24] As we have explained, legal impossibility exists where the act, if completed, would not be a crime, although what the actor intends to accomplish would be

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[23] TEX. PEN. CODE § 15.03 (a) ("A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.").

[24] This stands in contrast to the offense of criminal attempt where it is immaterial whether the attempted crime is impossible to complete. *Chen v. State*, 42 S.W.3d 926, 930 (Tex. Crim. App. 2001).

a crime.[25] Nevertheless, it has been previously argued that the doctrine of impossibility should not be a defense under the Texas Penal Code.[26] And though we have recognized that the common-law defense of legal impossibility is valid defense, we do not appear to have ever applied it.[27]

A natural reading of the text leads us to the conclusion that the State proves the offense of criminal solicitation by proving what a defendant believes the circumstances to be surrounding the solicited conduct and that such conduct would be a crime under those circumstances. The statute does not require the State to prove that those circumstances actually exist. We hold that this element of criminal solicitation was also subsumed within the proof necessary to establish the intent to commit capital murder under the attempted capital murder indictment. Consequently, we reject the court of appeals' determination

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[25] *Chen*, 42 S.W.3d at 929. Cited examples of legal impossibility include attempt to receive stolen property that was not stolen, attempt to murder a corpse, attempt of a minor to commit rape, attempt to bribe a public official for purposes of securing a particular vote when the official had no authority to vote on the matter, and the attempt to bribe a person believed to be a juror when that person is not actually a juror. *See Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (citing WAYNE R. LAFAVE, AUSTIN W. SCOTT, 2 SUBSTANTIVE CRIMINAL LAW § 6.3, at 46 (1986); CHARLES E. TORTIA, IV WHARTON'S CRIMINAL LAW § 747, at 581 (14th ed. 1981)).

[26] *Lawhorn*, 898 S.W.2d at 894 (Meyers, J., dissenting).

[27] *Chen*, 42 S.W.3d at 929; *see also Lawhorn*, 898 S.W.2d at 894 (Meyers, J., dissenting) ("In fact, there are no Texas cases in the last 30 years that even allude to the doctrine of impossibility, let alone employ it to decide whether evidence of guilt is sufficient for conviction.").

that under the pleadings in this case, attempted capital murder and solicitation of capital murder were not the same offense under *Blockburger*.[28]

IV. The *Blockburger* Rule Controls Here Because There Is No Clearly Expressed Legislative Intent to Impose Multiple Punishments

As the court of appeals held, "the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box."[29] The State points out that the Supreme Court held in *Garrett v. United States* that, "'There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.'"[30] But the Court also noted in that case that, "We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history."[31] This is reflected in *Benson*, where we held that, if two offenses are the same under the Texas *Blockburger* test,

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[28] *Bien*, 530 S.W.3d at 182 ("Under a strict application of the *Blockburger* test, the two offenses have differing elements and, therefore, would not be the same offense.").

[29] *Id.* at 183.

[30] State's Br. 6 (quoting *Garrett v. United States*, 471 U.S. 773, 779 (1985)).

[31] *Garrett*, *id*.

then a judicial presumption arises that the offenses are the same for purposes of double jeopardy and a defendant may not be punished for both absent "a clearly expressed legislative intent to impose multiple punishments."[32]

That intent is not clear here. There is no express provision that a person who is subject to prosecution for criminal solicitation and criminal attempt may be prosecuted under either or both sections.[33] Nothing clearly indicates a legislative intent to impose multiple punishments.[34] Though we arrive at the same location by a different path, we ultimately agree with the court of appeals that Appellant was convicted in a single criminal trial of two offenses that are considered the same for double jeopardy purposes.

V. The Appropriate Remedy is to Vacate the Conviction the State Chooses

When a defendant is convicted in a single criminal trial of two

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[32] *Benson*, 459 S.W.3d at 72.

[33] *Cf.* TEX. PENAL CODE § 22.04(h) ("A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections.").

[34] We have previously held that solicitation was meant to capture conduct short of attempt. *Schwenk v. State*, 733 S.W.2d 142 (Tex. Crim. App. 1981) (opin. on reh'g) (citing Searcy and Patterson, "Practice Commentary," V.T.C.A., Penal Code, Section 15.03). We held that the solicitation statute was "designed to make conduct which does not rise to the level of attempt or conspiracy a criminal offense." *Id*. at 145.

offenses that are considered the same for double jeopardy purposes, the remedy is to vacate one of the convictions. In *Landers v. State*, we set out the "most serious punishment" test for determining which of the same offenses in the double jeopardy context should be retained.[35] The determination of the "most serious punishment" we said, is "the longest sentence imposed, with rules of parole eligibility and good time serving as a tiebreaker."[36] In *Ex parte Cavazos*, we eschewed those rules-based tiebreakers and established the "most serious offense" test.[37] The "most serious offense" is the offense of conviction for which the "greatest sentence was assessed."[38] There, the tiebreaker was the fact that restitution had been imposed for only one of the offenses.[39] In *Villanueva v. State*, we revived parole eligibility as a factor by retaining the one conviction which included a deadly weapon finding.[40] Other tie breakers

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[35] *Landers v. State*, 957 S.W.2d 558 (Tex. Crim. App. 1997).

[36] *Id.* at 560.

[37] 203 S.W.3d 333, 338 (Tex. Crim. App. 2006).

[38] *Id*.

[39] *Id*. at 338-39.

[40] *Villanueva v. State*, 227 S.W.3d 744, 749 (Tex. Crim. App. 2007).

that have been used in the past include degree of felony,[41] first-indicted,[42] and offense named first in the judgment.[43]

In *Almaguer v. State*, the Corpus Christi Court of Appeals–faced with a situation in which no tie-breaker worked–followed the suggestion of Presiding Judge Keller in *Bigon* and remanded the case so that the prosecution could elect the offense of conviction.[44] The court cited this passage from the dissent:

> Although I authored *Landers*, the practical impossibility of determining in some cases which offense is really the most serious has convinced me that it would be preferable to simply give the local prosecutor the option to choose which conviction to retain. Making the matter a function of prosecutorial discretion seems to be most consistent with our prior recognition that a prosecutor in this type of situation is entitled to "submit both offenses to the jury for consideration" and receive "the benefit of the most serious punishment obtained." If a subjective decision is to be made, let the local prosecutor who exercised the decision to bring the case make it.[45]

We here do likewise–this is a question to be answered by the prosecutor. Here, the prosecutor has requested that the 3g offense–the criminal

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[41] *Berger v. State*, 104 S.W.3d 199, 206 (Tex. App.—Austin 2003, no pet.).

[42] *Ruth v. State*, No. 13–10–00250–CR, 2011 WL 3840503, at *8–9 (Tex. App.—Corpus Christi Aug. 29, 2011, no pet.) (not designated for publication).

[43] *Nickerson v. State*, 69 S.W.3d 661, 671 (Tex. App.—Waco 2002, pet. ref'd).

[44] 492 S.W.3d 338, 348-49 (Tex. App.—Corpus Christi 2014, pet. ref'd).

[45] *Bigon*, 252 S.W.3d at 374 (Keller, P.J., dissenting).

solicitation conviction–be retained. This is the offense that was upheld by the court of appeals. We affirm the court of appeals' judgment in whole.

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