

**IN THE COURT OF APPEALS OF IOWA**

No. 0-016 / 09-0990  
Filed February 24, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TERRY JOE LEGGIO,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Terry Leggio appeals from judgment and sentences entered upon his convictions of five counts of attempted murder. **AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

**DANILSON, J.**

Terry Leggio appeals from judgment entered upon his convictions five counts of attempted murder, contending there is insufficient evidence to sustain the convictions.<sup>1</sup> He also asserts he was denied his right of allocution at sentencing. We affirm the convictions, but remand for resentencing.

**I. Background Facts & Proceedings.**

In February 2009, Leggio was convicted of two counts of second-degree sexual abuse, three counts of third-degree sexual abuse, and one count of indecent contact with a child based upon his repeated sexual abuse of two daughters of his live-in girlfriend, Tammy. While he awaited sentencing scheduled in March 2009, he was an inmate at the Pottawattamie County Jail.

Leggio was housed in “Pod F,” as was John Pavey. The two communicated frequently through the air vents, at their cell doors, or through notes. Pavey complained about some unwanted attention his wife was receiving at work and boasted about an ability to have someone “take care of that for me.” Leggio was aggravated over a detention officer named “Ben” and Sergeant Dwayne Riche, stating he wanted something “done” to them.

On February 11, 2009, Pavey met with Sergeant Riche and informed him of Leggio’s statements. After meeting with Riche, Pavey wrote a note to Leggio in which he asked, “do you really want something done to that Sgt. Ritche [sic] & Ben? Are you serious or just blowing steam?” Leggio answered: “I do want something done with Sgt. Riche & Ben and also a few others but those two first.”

---

<sup>1</sup> Leggio was also convicted of five counts of solicitation to commit murder and five counts of conspiracy to commit murder. Those convictions are not challenged on appeal.

He continued, "I will do what ever I have to make this go away permanently if you know what I mean." Leggio then told Pavey he also wanted to include an Iowa Department of Human Services investigator named Caroline Price who had testified against him as well as Tammy and her three daughters. In a "kite" (an inmate communication form), Pavey alerted Sergeant Riche to Leggio's plans.

In the following days, Leggio prepared and gave to Pavey an accurate hand-drawn map with directions to Tammy's house, a detailed diagram of all three floors of Tammy's home, and a picture of Tammy and the girls with their names and ages included. Leggio also wrote a letter to his mother:

Dear Mom

I have a few things I'm going to tell you that can not no matter what be told to anyone else! but has to stay between me and you and this letter has to be destroyed when you have all the info I need and the new letter sent to me! The reason I say this is because 5 people are going to disappear permanently as in murdered. It's already started! all I need is a few final details to make it complete!

for starters I need to know if . . . email is still active. The address is on my yahoo messenger! I know you are probably going to think that I'm crazy for getting involved with this! I have had him checked out and he is legit!! And is willing to help me get out of this bullshit!! One way or another. . . . The fact is if this goes wrong I'm going to spend the rest of my life on death row. If it is ever linked to me which it won't be nothing in my handwriting leaves here it gets flushed after it is rewritten and ripped up.

Anyway I just want this taken care of and if it means them disappearing for good then be it. The only problem I going to have is it's going to cost me a lot of money about \$80,000 to do this but I do not have to pay it right away. I will have to do some kind of job for him later. But if there are no witnesses how are they going to testify against me!!! ["smiley" face drawn] Also if there is no investigator that worked on this case how is he going to testify to what he done or saw! They are not going to get away with this at all. Like I said there are 5 people going to disappear forever. Also there is going to be a letter sent to my attorney and the prosecutor from Tammy and girls saying that they lied and I never did anything they said I did with her signature.

What I need is email addresses and find out if they are still active.

I also need to know if she still has the same cell phone # and house phone #. . . .

I also need to know if you can find out what kind of hours Tammy is working . . . . and one other thing I like to know if you could get me S.S.#s for 4 of them. [names and dates of birth given]

. . . . I also like to know if we have the same sentencing date? This is going to be done by that time within the next 2 weeks they are disappearing forever!!!! . . . .

Love your Son,

Terry Leggio

Authorities intercepted Leggio's letter to his mother, copied it, gave it a new envelope, and arranged for a controlled delivery to Sue Leggio's postal box. The letter was picked up on February 23. A search warrant was executed on Sue Leggio's home in Ferguson, Iowa, on March 2. She took the officers to her computer and pulled Leggio's letter out of a stack of mail and said "this is what you're looking for." Her computer was seized and it was found that she had searched for the requested Social Security numbers.

Leggio also told Pavey he was willing to sign something to guarantee he would pay for the murders. Iowa Department of Criminal Investigation Special Agent Mitch Mortvedt prepared a mock promissory note, gave it to Pavey, and wired Pavey to record his conversation with Leggio. On February 27, 2009, after Pavey got the promissory note to Leggio, they had the following conversation through an air vent.

John Pavey [JP]: . . . [O]nce I get that [promissory note] from under your door and put it in an envelope and I give . . . that sealed envelope to the mail there's nothing I can do at that point. I can't recall it. You understand that.

Terry Leggio [TL]: (UNINTELLIGIBLE) \$50,000.

JP: Right, and I'm not talking about the promissory note. I'm talking about do you realize once I send this out that's my word to him that it's a go for it.

TL: Yeah.

JP: This is kind of a green light if you understand what I'm saying.

TL: I know.

.....

JP: Now, are you saying you want him shot in the forehead? You said through the forehead?

TL: You have to shoot him through the forehead.

JP: But you want Riche dead?

TL: Dead as a doornail.

JP: Okay, so we've got Riche covered. Now I've got three girls and a mother that we've talked about.

TL: Well, for one we already know that they're gonna be deceased.

JP: They're gonna be deceased, okay.

TL: We already talked about that for sure.

JP: Okay.

TL: Because we already talked about (UNINTELLIGIBLE) and that was a dangerous thing. The mother, you know, that she has to be . . . disposed of.

.....

JP: Okay, so you want them dead?

TL: Plain and simple; all five of them done, disappear, never to be found again.

JP: Okay. That's a done deal. When you sign that [promissory] note, I put it in an envelope and I go down to call my wife and Craig [Thomas] takes that thing and drops it in the mail basket, I can't retrieve it.

TL: Yeah.

.....

JP: . . . That \$50,000 is a cheap price for five bodies.

TL: But I will tell you this I'm not trying — I'm not going to back out on this, but I'll tell you that it might take me more than a couple of months after that to get myself so I can get myself re-established.

.....

JP: . . . Okay, let's wrap this up. Are you telling me you want Sgt. Riche, Tammy and them girls dead?

TL: They're done.

JP: You want them dead, yes or no.

TL: Yes.

JP: You understand once you sign that promissory note and it goes out it cannot be pulled back.

TL: I know that.

. . . .

JP: You want these people dead.

TL: Do it.

JP: Okay, sign that note and get it to me. . . .

TL: Let's put it this way John. The paper's signed.

JP: Last chance, you backing out?

TL: Nope.

JP: You want this done?

TL: Done.

Leggio returned the signed promissory note to Pavey on February 27, 2009.

On March 19, 2009, Leggio was charged with five counts of attempted murder in violation of Iowa Code section 707.11 (2009), five counts of conspiracy to commit murder in violation of sections 706.1 and 707.1, and five counts of solicitation to commit murder in violation of section 705.1 and 707.1. A jury returned guilty verdicts on all counts on June 4, 2009. At sentencing, the court concluded the solicitation and conspiracy charges should merge with the attempted murder charges, and sentenced Leggio to five twenty-five year terms to run consecutively.

Leggio appeals. He argues there is insufficient evidence to support the attempted murder convictions. He also contends he was improperly denied his right of allocution.

## **II. Scope and Standard of Review.**

We review sufficiency-of-the-evidence claims for correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). We consider all the record evidence, but we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *Id.* We will uphold a verdict if

substantial evidence supports it. *Id.* “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002).

### **III. Discussion.**

Attempted murder in Iowa occurs when a person specifically intends the death of another and commits “any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.” Iowa Code § 707.11. The second paragraph of section 707.11 provides:

It is not a defense . . . that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor’s expectations were not unreasonable in the light of the facts known to the actor.

Thus, to be guilty of attempted murder the statute requires (1) a specific intent to cause the death of another and (2) an overt act in furtherance of the required specific intent. Iowa Code § 707.11; *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004). The language of the statute, “the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person,” defines the type of overt act that is in furtherance of the required specific intent to commit attempted murder. *Young*, 686 N.W.2d at 185. The second paragraph of section 707.11 makes clear that it is the actor’s expectation of the consequences of his or her act, not the probability of the act’s success that is of relevance. *Id.* The factual possibility or probability that the action will be successful is irrelevant to the analysis. *Id.* at 186.

Iowa follows the “slight acts” approach to proving an act has gone beyond mere preparation to attempt. *State v. Spies*, 672 N.W.2d 792, 797 (Iowa 2003). Under this approach, the State must prove “(1) intent to commit the crime and (2) slight acts in furtherance of the crime that render voluntary termination improbable.” *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982); accord *Spies*, 672 N.W.2d at 797 (“slight acts” in context of delivery of methamphetamine); *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993) (“slight acts” in context of attempted murder of witness); *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984) (“slight acts” in context of burglary).

In *State v. Roby*, 194 Iowa 1032, 1043, 188 N.W. 709, 714 (1922), this court defined the act needed for attempt as one that would “reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. *It need not [even] be the last proximate act to the consummation of the offense . . .*”

*Erving*, 346 N.W.2d at 836.

The issue of whether a murder-for-hire case may constitute attempted murder rather than mere solicitation, where consummation of the murder was not effectuated, has not previously been determined by our supreme court. A complete analysis is unnecessary here, but the respective arguments have been thoroughly discussed by various other state courts and authorities. See *People v. Superior Court*, 157 P.3d 1017, 1021-25 (Cal. 2007) (hereinafter “*Decker*”); *State v. Disanto*, 688 N.W.2d 201, 207-12 (S.D. 2004); Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612 (1973).

The distinction between the two crimes becomes muddled by the general principle that mere preparation does not constitute an attempt. Thus, courts

review solicitation and mere conversation without affirmative acts as generally insufficient to constitute a criminal attempt. *Disanto*, 688 N.W.2d at 211. As our supreme court has stated:

Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt, and the courts should not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation and what an act done toward the commission of a crime. It would be useless to attempt to lay down any rule by which an act might be characterized as overt or otherwise in a particular case; general principles must be applied in each case as nearly as can be, with a view to working out substantial justice.

*Roby*, 194 Iowa at 1043, 188 N.W. at 714.

We agree with those courts that have concluded solicitation to commit murder, combined with a completed agreement or concrete payment arrangement to hire a killer, and further acts in implementing or assisting the would-be killer, can constitute attempted murder. See *Decker*, 157 P.3d at 1024; *Disanto*, 688 N.W.2d at 214 (Gilbertson, C.J., dissenting). Such a conclusion is consistent with the “slight acts” requirement, the requirement that the defendant’s voluntary termination is improbable, and depending upon the circumstances may constitute an overt act that sets in motion the commission of the criminal offense.

Here, the jury was properly instructed that to prove attempted murder the State had to prove Leggio “committed an act by which he expected to set in motion a force or chain of events which could have caused or resulted in the death” of each of his intended victims, and that he specifically intended to cause each of their deaths. They were further instructed:

## Instruction No. 29

It is not a defense to the offense of attempt to commit murder that the acts proved could not have caused the death of any person, provided that the Defendant intended to cause the death of some person by so acting, and the Defendant's expectations were not unreasonable in the light of the facts known to the Defendant.

## Instruction 29A

An attempt must go beyond mere preparation. Preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To constitute an attempt, preparations must have advanced to a point where they directly tend to the commission of the crime.

The evidence reflects that Leggio entered into an agreement with Pavey; provided maps, diagrams, and a photo of his victims; identified the females by ages and birthdates; enlisted his mother's help to pay for the plan; tried to get Tammy's work schedule; identified Sergeant Riche's unmarked vehicle; and signed a \$50,000 promissory note. Leggio understood that his plan to have the intended victims killed was irretrievable once he signed and returned the promissory note. Based upon the evidence presented, the jury could find that Leggio committed overt acts by which he expected to set in motion a force or chain of events which could have caused or resulted in the death of each of his intended victims. Consequently, substantial evidence supports the convictions of attempted murder.

**IV. Allocution.**

The State concedes that Leggio was not provided the opportunity of allocution. See Iowa R. Crim. P. 2.23(3)(d). We must therefore vacate his sentence and remand for resentencing. See *State v. Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001); *State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997).

**V. Conclusion.**

Substantial evidence supports Leggio's convictions for attempted murder, and we affirm the judgment entered thereon. However, because Leggio was not afforded his right of allocution, we remand for resentencing.

**AFFIRMED IN PART, SENTENCE VACATED AND REMANDED FOR RESENTENCING.**