STATE OF MINNESOTA
IN COURT OF APPEALS
A14-1410

In the Matter of the Welfare of: J. D. L., Child

Filed March 9, 2015
Affirmed
Worke, Judge
Concurring specially, Stauber, Judge

Waseca County District Court
File No. 81-JV-14-310

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brenda Miller, Waseca County Attorney, Anna Fisher, Assistant County Attorney, Waseca, Minnesota (for appellant state)

Mark Nyvold, Special Assistant Public Defender, Fridley, Minnesota (for respondent J.D.L.)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Stoneburner, Judge.*

U N P U B L I S H E D O P I N I O N

WORKE, Judge

The state challenges the district court's dismissal of four counts of attempted first-degree murder and two counts of attempted first-degree damage to property for lack of probable cause, arguing that dismissal has a critical impact on the outcome of the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

prosecution and the district court erred in holding that probable cause did not exist to believe that respondent took a substantial step toward the commission of the offenses. We agree that there is insufficient probable cause that respondent took a substantial step toward the commission of the offenses and affirm.

FACTS

On April 29, 2014, a 911 caller reported that a white male wearing a backpack appeared to be breaking into a storage unit. Officers found respondent J.D.L.[1] inside a unit that contained materials commonly used for making explosive devices—ammunition boxes, a scale, a pressure-cooker box, and packaging material for red iron oxide. J.D.L. stated that if the officers correctly guessed what he was doing in the storage unit he would talk to them. An officer guessed that J.D.L. was making explosive devices. J.D.L. said yes, and agreed to talk with the police.

J.D.L. then explained his plan, which he intended to execute sometime before the end of the school year; he estimated May 20, 2014.[2] First, J.D.L. planned to kill his mother, father, and sister by shooting them with a .22 caliber rifle.[3] Next, he planned to start a fire in a rural field to draw first responders away from Waseca. J.D.L. then planned to go to the Waseca Junior and Senior High School armed with "several explosive/incendiary devices, Molotov cocktails, firearms, and ammunition." There J.D.L. planned to set off two pressure-cooker bombs in the cafeteria, hoping that the

[1] J.D.L. was 17 years old at the time.

[2] J.D.L. wanted to carry out the attack on April 20, the anniversary of the Columbine massacre, but April 20, 2014, fell on a Sunday.

[3] J.D.L.'s father told police that J.D.L. was aware of a .22 caliber pistol in the basement of the family home.

explosions would kill and maim students. While the school liaison officer was helping the students, J.D.L. planned to shoot him to prevent the officer's interference with his plan. Next, J.D.L. planned to shoot and kill as many students as possible, set off pipe bombs, and throw Molotov cocktails down the main school corridors and shoot and kill students as they rushed out of the corridors. Finally, J.D.L. planned on the SWAT team killing him.

J.D.L. told officers that he had "an SKS assault rifle, with 400 rounds of ammunition" and additional firearms and ammunition in a gun safe in his bedroom. He also told officers that he had three explosive devices in his bedroom that were ready to go off with the lighting of the fuse. J.D.L. stated that he had a notebook in his bedroom detailing his plan.

J.D.L.'s notebook included entries from July 24, 2013, to April 27, 2014, that revealed his (1) thoughts, (2) plans, (3) to-do lists, (4) supply lists, (5) successes and failures with explosive-device experimentations[4], (6) changes to explosive devices learned through his failures, (7) reconnaissance he planned at the school, (8) attempts to obtain and successful acquisitions of firearms and ammunitions, and (9) alternative plans if something went wrong. J.D.L. also wrote how he planned to obtain components and chemicals for the explosive devices: get a job to finance his plan[5]; get a checking account, debit card, and PayPal account to purchase items; and rent a storage unit.[6]

[4] To perfect his explosive devices, J.D.L. detonated several devices in various locations in Waseca, including one at the Waseca Junior and Senior High softball fields.
[5] J.D.L. began employment in late August 2013.
[6] J.D.L.'s friend's mother rented the unit on his behalf.

J.D.L. also documented in his notebook: (1) the amount of chemicals he intended to use and the expected blast radius; (2) changes he made to the devices; (3) how he planned to get the devices into the school, where he intended to place them, and how to disguise them; and (4) his plans to acquire firearms and ammunition, including stealing shotgun shells from a relative, buying a gun, and burglarizing a home.

Officers found seven firearms, ammunition, and three bombs[7] in J.D.L.'s home. In the storage unit they found: (1) three bombs; (2) 15 pounds of potassium perchlorate; (3) five pounds of aluminum powder; (4) two pounds of smokeless powder; (5) ten pounds of red iron oxide; (6) one gallon of roof cement; (7) antistatic bags used for blending interjection compounds; (8) approximately 60 pounds of metal ball bearings; (9) screws; (10) three firing systems; (11) a pressure cooker; (12) three boxes of Remington 12-gauge buckshot; (13) a ski mask, BDU pants, a black long-sleeve shirt, and a black trench coat; (14) two black backpacks; (15) end caps, fuses, PVC pipes and cement, cans of static guard, goggles, wire, scissors, and glue; (16) nine spent CO2 cartridges, wire stripper, solder and a solder gun; (17) metal pipe with end cap and hobby fuse; (18) two metal pipes with end caps; (19) Avon pipes #1, #2, and #3, three end caps, E-blank opening, and hobby fuses; (20) five mason-style glass jars; (21) two LED lanterns; (22) 12 gauge .00 buck shot shells; (23) miscellaneous electrical supplies; (24) Christmas light bulbs; (25) military trip wire; (26) cans of WD-40; (27) a time fuse; and (28) scales.

[7] The Bloomington Bomb Squad detonated the completed bombs at the airport.

J.D.L. told officers that when he was discovered inside the storage unit on April 29, he was bringing his Molotov supplies to his unit. He stated that he was planning to further prepare for his attack by taping WD-40 cans to the pressure-cooker bomb. But before he could execute his plan, J.D.L. had two remaining tasks: (1) purchase a second pressure cooker, and (2) steal a shotgun. He stated that after he stole the 12 gauge from his friend's house he would "be basically ready to go." J.D.L. boasted that if the officers had not intervened, he would have successfully completed the attack.

On May 1, 2014, a petition was filed charging J.D.L. with four counts of attempted first-degree murder, in violation of Minn. Stat. §§ 609.185, subd. (a)(1), .17, subd. 1 (2012); attempted first-degree damage to property, in violation of Minn. Stat. §§ 609.595, subd. 1(1), .17, subd. 1 (2012); attempted first-degree damage to property, in violation of Minn. Stat. §§ 609.595, subd. 1(3), .17, subd. 1 (2012); and six counts of possession of explosive/incendiary device by an individual under 18 years of age, in violation of Minn. Stat. § 609.668, subd. 2(a) (2012). After the state moved for adult certification, *see* Minn. Stat. § 260B.125, subd. 3 (2012) (presumptive certification for felony offenses involving presumptive commitment to prison when child was 16 or 17 at the time of offense), J.D.L. moved to dismiss all charges for lack of probable cause.

The district court dismissed the attempted first-degree murder and attempted first-degree damage-to-property charges for lack of probable cause, after finding that although J.D.L. was preparing to commit the offenses, he had not taken a "substantial step" toward the commission of the crimes. The district court stated that J.D.L. "did not brandish or point a firearm or fire shot(s) at the alleged victims," never threatened his alleged victims,

"did not express any hatred or animosity towards the alleged victims," did not relocate any bomb-making materials to the high school where he planned to detonate the devices, and did not reschedule his plan for any specific day. The court also found that although J.D.L. indicated that he would shoot his family with a .22 caliber rifle, no such rifle was found in the family residence. The district court concluded that J.D.L.'s preparatory actions were "remote to both the time and place of the intended crimes," and that "beyond procuring and assembling the [explosive] devices, no further action was taken." The state's pretrial appeal followed.

D E C I S I O N

Jurisdiction

The state appeals the district court's dismissal for lack of probable cause. J.D.L. argues that the state's appeal must be dismissed for lack of jurisdiction because the district court's order is not appealable.

The state may appeal an order "dismissing the charging document for lack of probable cause when the dismissal was based solely on a question of law." Minn. R. Juv. Del. P. 21.04, subd. 1(F); *see State v. Duffy*, 559 N.W.2d 109, 110-11 (Minn. App. 1997) (stating that dismissal based on an error of law is appealable because further prosecution is effectively blocked, but when based on factual determinations, such as evidence being insufficient to establish probable cause, dismissal is not appealable because the state is free to secure additional evidence and reissue the complaint); *State v. Aarsvold*, 376 N.W.2d 518, 520-21 (Minn. App. 1985) (explaining that when dismissal is based on determination of applicability of a statute to given facts, a different district court would

not likely rule differently because district courts do not tend to disagree in matters regarding legal interpretation, but may disagree on factual issues), *review denied* (Minn. Dec. 30, 1985), *superseded by statute on other grounds*, Minn. Stat. § 609.195(b).

"[W]hether the dismissal is based on a legal or a factual determination is a threshold jurisdictional question. An appellant must make the jurisdiction of the appellate court appear plainly and affirmatively from the record presented." *State v. Ciurleo*, 471 N.W.2d 119, 121 (Minn. App. 1991); *see Holliston v. Ernston*, 120 Minn. 507, 508, 139 N.W.805, 805 (1913) ("When the order appealed from is not appealable, this court is without jurisdiction, and the appeal should be dismissed."). Jurisdiction is a question of law reviewed de novo. *Harms v. Oak Meadows*, 619 N.W.2d 201, 202 (Minn. 2000).

A dismissal based on a legal determination involves interpretation of a statute. For example, in *Aarsvold*, the dismissal of a felony-murder charge predicated on sale of cocaine was determined appealable because the district court determined that sale of cocaine was not a proper felony upon which to base a felony-murder charge under Minn. Stat. § 609.19, subd. 2. 376 N.W.2d at 523. Essentially, the district court ruled that the defendant could not be charged with causing the death of another by way of the felonious sale of cocaine because under the felony-murder statute, the sale of cocaine is not the type of felony upon which to base a felony-murder charge. *Id.* This court further rationalized that the order was appealable because the state had no additional evidence to gather, which rendered reissuing the complaint pointless and effectively prevented prosecution. *Id.* at 520.

In contrast, dismissals are not appealable when the district court's ruling is based on a statute's applicability to given facts. In *Duffy*, for example, the district court's dismissal of cocaine-sale and conspiracy-to-sell-cocaine charges was not appealable because it was based on factual determinations that the evidence was insufficient to support the charges. 559 N.W.2d at 111. The district court determined that probable cause in the complaint failed to establish the second element of a conspiracy offense—that one conspirator committed an overt act in furtherance of the underlying crime. *Id.*

Here, J.D.L. was charged with attempted first-degree murder and attempted first-degree damage to property. Under the attempt statute, an individual must have intent to commit a crime and must commit "an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1. The district court determined that because J.D.L. did not brandish, point, or shoot a firearm at his intended victims; openly threaten or express any hatred or animosity toward his intended victims; reschedule a day to carry out his plan; transport the explosive devices to the school; detonate devices at the school; or injure any individual, that he "did not make a substantial step, beyond mere preparation, toward the commission" of the attempted-murder and attempted-damage-to-property crimes. The state concedes that it had no additional evidence to gather.

J.D.L. argues that the district court "made no legal ruling construing or interpreting the attempt statute." But the district court interpreted the statutory definition of attempt by concluding that because J.D.L. did not commit particular, limited acts—he did not shoot a firearm, threaten or express hatred toward his intended victims,

reschedule his plan, detonate devices, or injure an individual—that he did not take a substantial step toward the commission of the offenses. The attempt statute is not limited to these specific acts. Similar to *Aarsvold*, the district court interpreted a statute and made a legal determination that probable cause was lacking because J.D.L. did not commit specific acts. Because the district court's probable-cause dismissal was based on legal determinations—J.D.L. did not commit an attempt because he did not commit particular acts—the order is appealable and we have jurisdiction to consider the merits of the appeal.

Dismissal

This court will reverse the district court's pretrial probable-cause dismissal "only if the state demonstrates clearly and unequivocally that the district court erred in its judgment and, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001).

Critical impact

To establish critical impact, the state must demonstrate only that the district court's ruling will significantly reduce the likelihood of a successful prosecution; it is enough if it affects the state's ability to prosecute only a specific charge. *State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011); *Trei*, 624 N.W.2d at 597 (concluding that critical-impact requirement was met when the district court dismissed one count of a complaint alleging violations of several criminal statutes); *State v. Poupard*, 471 N.W.2d 686, 689 (Minn. App. 1991) ("[T]he dismissal of a charge clearly has a critical impact on the

outcome of the trial."). The dismissal of six counts in the 12-count petition satisfies the critical-impact requirement.

To further bolster its critical-impact argument, the state argues that dismissal of the most serious charges affects certifying J.D.L. as an adult.

> It is presumed that a proceeding involving an offense committed by a child will be certified if: (1) the child was 16 or 17 years old at the time of the offense; and (2) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison under the Sentencing Guidelines and applicable statutes, or that the child committed any felony offense while using, whether by brandishing, displaying, threatening with, or otherwise employing, a firearm.

Minn. Stat. § 260B.125, subd. 3. The petition's remaining six counts of possession of explosive/incendiary device by an individual under 18 years of age may not meet the second requirement for a presumptive certification, whereas the attempted first-degree-murder charges would result in a presumptive certification. *Compare* Minn. Stat. § 609.668, subds. 2(a), 6 (2012) (stating that a person under the age of 18 years who possesses incendiary devices may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both), *with* Minn. Stat. § 609.185(a)(1) (stating that whoever causes the death of a human being with premeditation and with intent to effect the death of the person or of another shall be sentenced to imprisonment for life).

The state does not provide any authority to support its contention that critical impact exists because the dismissal affects the presumption of certification. Additionally, certification does not determine whether a prosecution will be successful. A successful

prosecution could result if the court retained the proceeding in juvenile court. Moreover, a juvenile court may order certification even if it finds that the presumption does not apply, provided that the state demonstrates that certification serves public safety. Minn. Stat. § 260B.125, subds. 1, 2(6)(ii) (2012).

The state also argues that dismissal of the six most serious charges against J.D.L. thwarts a presumptive commitment to state imprisonment. But the fact that our legislature has not heightened the penalty for possession of explosive/incendiary devices does not show that critical impact exists.[8] Nevertheless, although the state may not have established critical impact by relying on dismissal affecting the presumption of certification or sentencing options available, critical impact is established because dismissal affects the state's ability to prosecute the six dismissed charges.

Probable cause

The state argues that the district court clearly and unequivocally erred by dismissing the attempted-murder and attempted-damage-to-property charges for lack of probable cause. This court reviews de novo the district court's dismissal for lack of probable cause based on a legal determination. *State v. Linville*, 598 N.W.2d 1, 2 (Minn. App. 1999).

[8] The growing number of cases in which explosive/incendiary devices are used with intent to kill, harm, or maim gives us pause to consider whether the punishment available upon conviction adequately reflects the seriousness of the crime charged. But this question is not for an appellate court to resolve. It presents a matter that the legislature is capable of addressing. *See Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963) (noting the legislature, and not the court, must make statutory changes).

In general, "the test of probable cause is whether the evidence worthy of consideration . . . brings the charge[s] . . . within reasonable probability." *State v. Florence*, 306 Minn. 442, 446, 239 N.W.2d 892, 896 (1976) (quotation omitted). Probable cause is a lower standard than proof beyond a reasonable doubt; to support a charge the state has to show only that a reasonable probability exists that the defendant committed the crime. *See State v. Knoch*, 781 N.W.2d 170, 177 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). The question is: "Given the facts disclosed by the record, is it fair and reasonable . . . to require the [accused] to stand trial?" *Florence*, 306 Minn. at 457, 239 N.W.2d at 902.

The state argues that the district court erred by concluding that J.D.L. "did not make a substantial step, beyond mere preparation, toward the commission" of the offenses. J.D.L. counters that the district court appropriately relied on Minnesota attempt law in concluding that he did not make a substantial step beyond preparation. The parties are at odds regarding when preparation ends and an attempt begins.

In Minnesota, an attempt crime is committed when: A person "with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime." Minn. Stat. § 609.17, subd. 1. The court in *State v. Dumas* explained:

> no definite rule, applicable to all cases, can be laid down as to what constitutes an overt act or acts tending to accomplish a particular crime, within the meaning of our statute. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom. It may be stated, however, as a general proposition that to constitute an attempt to commit a crime there must be an

> intent to commit it, followed by an overt act or acts tending, but failing, to accomplish it. The overt acts need not be such that, if not interrupted, they must result in the commission of the crime. They must, however, be something more than mere preparation, remote from the time and place of the intended crime; but if they are not thus remote, and are done with the specific intent to commit the crime, and directly tend in some substantial degree to accomplish it, they are sufficient to warrant a conviction.

118 Minn. 77, 83-84, 136 N.W. 311, 314 (1912). The purpose of the statute criminalizing an attempt "is to prevent crime by punishing all attempts to commit it." *Id.* at 82, 136 N.W. 311 at 314.

The state relies on several cases from foreign jurisdictions. J.D.L. argues that our consideration of caselaw from foreign jurisdictions is neither necessary nor permissible because there is no deficiency in Minnesota attempt law. J.D.L. is correct in this argument especially when the state asks us to rely on attempt law that defines "substantial step" markedly differently than it is defined in Minnesota.

The state urges us to rely on *People v. Lehnert*, in which the defendant was found guilty of attempted first-degree murder and possession of explosive or incendiary devices. 163 P.3d 1111, 1112 (Colo. 2007). The jury relied on evidence that the defendant acquired almost all of the materials required to create a pipe bomb; gathered significant information about one of her intended victims, including his address, information about his children, and the car his family drove; and had reconnoitered his house and neighborhood more than once. *Id.* at 1115-16. Although similar to J.D.L.'s planning, in Colorado "the statutory crime of criminal attempt is complete upon engaging, with the requisite degree of culpability, in conduct that is strongly

corroborative of the firmness of the actor's purpose to complete the commission of the offense." *Id.* at 1113 (quotation omitted). In Colorado, a substantial step is "any conduct that is strongly corroborative of the actor's criminal objective." *Id.* at 1113, 1114 (quotation omitted).

If the attempt law in Minnesota similarly focused on conduct strongly corroborative of the actor's criminal objective, J.D.L.'s conduct would fall precisely within the proscribed conduct. But in Minnesota, we focus on the acts the defendant committed in furtherance of commission of the offense. We require intent to commit a crime and a "substantial step" that is an overt act and more than mere preparation. *Dumas*, 118 Minn. at 83-84, 136 N.W. at 314; *see, e.g.*, *Davis v. State*, 595 N.W.2d 520, 526 (Minn. 1999) (evidence that defendant made stabbing motion toward victim, although knife blade had broken off, sufficient to show substantial step toward attempted murder); *State v. Cox*, 278 N.W.2d 62, 66 (Minn. 1979) (evidence that defendant applied a rag doused with starting fluid to his wife's face until she lost consciousness, carried her to her car in the garage, taped her hands and feet together, and turned on the car's motor sufficient to show substantial step toward attempted first-degree murder); *State v. Peterson*, 262 N.W.2d 706, 707 (Minn. 1978) (evidence that defendant grabbed victims and chased them when they fled sufficient to show substantial step toward attempted rape); *State v. Johnson*, 756 N.W.2d 883, 893 (Minn. App. 2008) (evidence that defendant aimed gun and fired shots sufficient to show that defendant took a substantial step toward attempted second-degree murder), *review denied* (Minn. Dec. 23, 2008).

Under Minnesota law, the district court did not err in concluding that J.D.L. did not commit a substantial step toward commission of the offenses.

The state also argues that the attempt here occurred when J.D.L. stored a loaded gun in his bedroom and was prepared to kill his family upon discovery of his plan. But individuals are permitted to have loaded weapons in their homes. J.D.L. may have had the intent to kill his family if his plan was exposed, but he did not commit a substantial step toward commission of an attempted murder by merely stashing a loaded weapon in his bedroom.

When the officers found J.D.L. in the storage unit on April 29, he was still preparing for his plan. J.D.L. told the officers that he had two things to do before he was ready. While J.D.L. planned for at least nine months, he did not engage in anything more than preparation for the commission of the crimes. The law in Minnesota does not prohibit J.D.L.'s conduct. We cannot invite speculation as to whether the acts would be carried out. At present, our attempt laws reach no further. Because our decision is consistent with this court's role as an error-correcting court and the current state of Minnesota law we affirm the district court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.").

Affirmed.

STAUBER, Judge (concurring specially)

While I agree with the majority that J.D.L. did not commit a substantial step in furtherance of the commission of the offenses, I write this special concurrence because, relying on the majority's probable-cause-dismissal analysis, I reach the conclusion that the order is not appealable and the appeal should be dismissed.