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'Attempted threat' crimes and Oduwole

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Last month, an appellate court reversed the conviction of Olutosin Oduwole — a former Southern Illinois University student and aspiring rap artist — for an "attempt to make a terroristic threat" (*People v. Oduwole,* __ N.E.2d __, 2013 WL 885173 (Ill. App. 5th Dist., March 6, 2013)).

The case became a cause célèbre in the blogosphere when Illinois Attorney General Lisa M. Madigan announced she would appeal the decision to the Illinois Supreme Court. The notion circulating on the Internet is that Oduwole is being victimized by overzealous prosecutors who are persecuting him for no more than drafting provocative song lyrics.

But the idea that First Amendment values are at stake in the case is misconceived.

The case merits our attention not because prosecutors credulously equated song lyrics with weapons of mass destruction, but rather because Oduwole's prosecution threatens to stretch the law of attempt in Illinois beyond reasonable bounds, by punishing conduct — an "attempted threat" — even when that conduct holds no real possibility of bringing about an imminent social harm.

Police were already investigating Oduwole for possible firearms violations in July 2007, when they found his abandoned car on the SIU campus in Edwardsville and impounded it. During an inventory search, officers discovered a piece of paper covered with handwriting. The paper included violent and sexually suggestive rap lyrics, as well as what seemed to be a draft of an extortion note, demanding that money be sent to a PayPal account or else "a murderous rampage similar to the VT shooting will occur at another highly populated university."

The massacre of students at Virginia Tech had happened just a few months before Oduwole's arrest and, chillingly, the shootings at Northern Illinois University would happen just seven months later. The passage concluded, "THIS IS NOT A JOKE!"

The lyrics were written in black ink, while the threatening passage was in blue. At trial, the jury also learned that Oduwole had purchased four high-caliber firearms with high-capacity magazines on-line, that he'd kept a loaded firearm on campus without permission and that he'd opened a PayPal account under a pseudonym. In light of this evidence and counter to the position taken by Oduwole's lawyers, the jury found that the passage about the "murderous rampage" was not part of Oduwole's rap lyrics.

The jury's conclusion that Oduwole intended to make a terroristic threat was certainly a reasonable one, making it difficult to see why some commentators are reading this case as a threat to artistic freedom. What should cause us concern, however, is the prospect that in Illinois our law of attempt could be stretched to reach someone like Oduwole, whose activity did not bring him close to harming anyone.

To be sure, where there is evidence that a person intends to commit a crime and that he has the firmness of purpose to follow through with it, we want to allow the police latitude to intervene and make an arrest before the public is put at risk. That's why the common law's "last step" rule — which allowed a conviction for attempt only if the defendant did everything necessary to complete his crime — has been universally abandoned.

At the same time, we do not punish for thoughts alone; we want to be certain a defendant really would have followed through with his criminal plan before we feel justified in punishing him.

The earlier we draw the line between acts of mere preparation and criminally liable attempts, the less certain we can be that the defendant wouldn't have abandoned his scheme altogether. In Illinois, for example, by statute, a defendant can be held liable for an attempt quite early — once he takes a "substantial step in a course of conduct planned to culminate in [his] commission of the crime" (720 ILCS 5/8-4(a)). Nonetheless, the Illinois Supreme Court has construed this provision to authorize liability only where the defendant's conduct brings him within "dangerous proximity" of completing his intended crime (*People v. Terrell*, 459 N.E.2d 1337, 1341 (Ill. 1984)).

The appellate court in Oduwole's case held that no reasonable jury could have concluded that Oduwole came dangerously close to making a terroristic threat, observing that his threatening note was left in his own car out of sight of the public and that there was no evidence he was about to post the note to the Internet or otherwise distribute it.

But beyond observations of this nature, the court did little to explain why its conclusion was any more or less reasonable than that of the jury, which heard the same evidence firsthand and concluded the opposite.

The appellate court's decision should nonetheless be affirmed, because although Oduwole may have been dangerously close to making a terroristic threat, the danger of any imminent harm to anyone from Oduwole's conduct was exceedingly remote. Why? Because Oduwole was not accused of attempting to commit a terroristic act (something which we rightly want police to interrupt early in a suspect's course of conduct), but rather of attempting to threaten to commit a terroristic act.

Under these circumstances, there was no appreciable danger to the public that required police intervention at this early stage in Oduwole's conduct. Had the police failed to intervene before Oduwole completed his "attempted" crime, then Oduwole would have succeeded in doing no more than making a threat to commit a further crime.

"Threat" crimes are what we call inchoate, meaning they are designed to criminalize conduct that is preparatory to the completion of more serious crimes. "Attempt" crimes are likewise inchoate in nature, because they allow us to punish someone before he completed his criminal conduct. "Attempted threat" crimes are therefore doubly inchoate and allow punishment for conduct that in most (if not all) cases is unlikely imminently to cause any actual social harm — even if the primary crime is a serious one, as in Oduwole's case.

Whether criminal liability is ever justified for "attempted threat" crimes is an academic question that the Illinois Supreme Court will not likely address in this matter.

It would be worthwhile, though, for the court to hear the Oduwole case in order to clarify what "dangerous proximity" means in the context of "attempted threat" and other doubly inchoate types of crimes. Critics of Oduwole's prosecution are correct that his case implicates important legal principles, but threats to the First Amendment are not among them.