

ATTEMPT

In this Commonwealth, an attempt to commit a crime is itself a crime.

Section 6 of chapter 274 of our General Laws provides that:

**“Whoever attempts to commit a crime
by doing any act toward its commission,
but fails in its perpetration,
or is intercepted or prevented in its perpetration,
shall . . . be punished”**

The defendant is charged with (attempted) (an attempt to) _____.

To prove that the defendant is guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

***First:* That the defendant had a specific intent to commit that particular crime;**

***Second:* That the defendant took an overt act toward committing that crime, which was part of carrying out the crime, and came reasonably close to actually carrying out the crime; and**

***Third:* That the defendant’s act did not result in a completed crime.**

The essence of the crime of attempt is that a person has a specific

intent to commit a crime and takes a specific step toward committing that crime.

SUPPLEMENTAL INSTRUCTION

***Overt act.* An “overt act” is some actual, outward, physical action, as opposed to mere talk or plans. It is not enough that someone just intends to commit a crime or talks about doing so.**

The overt act must also be a real step toward *carrying out* the crime. Preliminary preparations to commit a crime are not enough. The overt act has to be more of a step toward actually committing the crime, after all the preparations have been made. It must be the sort of act that you could reasonably expect to trigger a natural chain of events that will result in the crime, unless some outside factor intervenes.

It doesn’t have to make the crime inevitable. For example, a pickpocket can be guilty of attempted larceny for putting his hand in another person’s pocket with the intent to steal, even if it turns out that there is no money in that pocket. And a person

can be guilty of attempted murder even if he doesn't hold the pistol straight when he shoots it at someone. But the overt act must be pretty closely linked with actually accomplishing the intended crime. It has to be an act that isn't too remote, and that is reasonably expected to bring about the crime. This is a question of fact that you must determine from all the evidence in the case.

NOTES:

1. **District Court jurisdiction.** Since the District Court has final jurisdiction over some attempts but not others, the judge should examine the complaint before trial. An attempt charge brought under the general attempt statute (G.L. c. 274, § 6) is within the District Court's final jurisdiction unless the attempted crime was murder. The District Court also has final jurisdiction over attempted burning to defraud an insurer (G.L. c. 266, § 10), attempted escape (G.L. c. 268, §§ 16-17), and certain attempted bribery offenses (G.L. c. 268, §§ 13, 13B; G.L. c. 268A, § 2; G.L. c. 271, §§ 39[a], 39A). The District Court does *not* have final jurisdiction over attempted murder (G.L. c. 265, § 16), attempted extortion (G.L. c. 265, § 25), attempted poisoning (G.L. c. 265, § 5A), or attempted safe-breaking (G.L. c. 266, § 16). See G.L. c. 218, § 26.

2. **Intent.** Complaints charging an attempt require proof "that the defendant had a conscious design to achieve the felonious end If the [underlying] crime as defined includes the element of intent . . . , the prosecution must prove a specific intent on the part of the defendant." *Commonwealth v. Saylor*, 27 Mass. App. Ct. 117, 535 N.E.2d 607, 610 (1989).

3. **Proximity to success.** An attempt requires specific intent to commit the substantive crime, *Commonwealth v. Ware*, 375 Mass. 535, 537, 368 N.E.2d 1183, 1184 (1978); *Commonwealth v. Hebert*, 373 Mass. 535, 537, 368 N.E.2d 1204, 1206 (1977), coupled with an overt act which need not inevitably accomplish the crime but "must come pretty near to accomplishing that result Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd," *Commonwealth v. Kennedy*, 170 Mass. 18, 20-21, 48 N.E. 770, 770-771 (1897) (shooting at post thought to be a person is not a criminal attempt, but shooting at a person with a pistol not aimed straight is). Mere intent or preparation are not enough; the overt act must lead toward the actual commission of the crime after preparations have been made. *Commonwealth v. Burns*, 8 Mass. App. Ct. 194, 196, 392 N.E.2d 865, 867 (1979). "The most common types of an attempt are either an act which is intended to bring about the substantive crime and which sets in motion natural forces that would bring it about in the expected course of events but for an unforeseen interruption . . . or an act which is intended to bring about the substantive crime and would bring it about but for a mistake in judgment in a matter of nice estimate or experiment In either case the would-be criminal has done his last act Obviously new considerations come in when further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass. In this class of cases there is still a chance that the would-be criminal may change his mind. In strictness, such first steps cannot be described as an attempt [A]n overt act . . . is not

punishable if further acts are contemplated as needful But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a [criminal attempt]." *Commonwealth v. Peaslee*, 177 Mass. 267, 271-272, 69 N.E. 55, 56 (1901) (Holmes, C.J.). See *Commonwealth v. Scott*, 408 Mass. 811, 821-822, 564 N.E.2d 370, 377-378 (1990) (victim's clothes ripped off, and a hair from victim found inside defendant's shorts, sufficient for attempted rape conviction); *Commonwealth v. Ortiz*, 408 Mass. 463, 472, 560 N.E.2d 698, 703 (1990) (defendant who armed himself and went searching for intended victim, but did not locate him, cannot be convicted of attempted ABDW); *Commonwealth v. Hamel*, 52 Mass. App. Ct. 250, 256, 752 N.E. 2d 808, 813 (2001) (furnishing information regarding form of payment, description of victims, and site for killings to solicitee feigning cooperation, not sufficient for attempted murder conviction). Factual impossibility is not a defense if the crime is apparently possible. *Commonwealth v. Jacobs*, 9 Allen 274, 275-276 (1864); *Commonwealth v. Starr*, 4 Allen 301, 305 (1862); *Commonwealth v. McDonald*, 5 Cush. 365, 367-368 (1850) (pickpocketing empty pocket). See discussion in *Commonwealth v. Bell*, 67 Mass. App. Ct. 266, 853 N.E. 2d 563 (2006).

4. **Overt act.** An attempt complaint is fatally defective if it does not include an allegation of any specific overt act. *Commonwealth v. Gosselin*, 365 Mass. 116, 121, 309 N.E.2d 884, 888 (1974); *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 710-711, 542 N.E.2d 327, 332-333 (1989); *Burns, supra*. But retrial is permissible since such a defective complaint does not put the defendant in jeopardy. *Id.*, 8 Mass. App. Ct. at 198 n.2, 392 N.E.2d at 869 n.2 Only the overt act or acts alleged in the complaint may be proved to satisfy the requirement of an overt act. *Gosselin, supra; Peaslee*, 177 Mass. at 274, 59 N.E. at 57. An attempt complaint is not required to set out the elements of the substantive crime attempted. *McDonald, supra* at 367.

5. **Failure of attempt.** The third element of the model instruction follows the apparent requirement of G.L. c. 274, § 6 that conviction under that section requires proof that the defendant "fail[ed] . . . or [was] intercepted or prevented" from carrying out the intended crime. See *Commonwealth v. Dixon*, 34 Mass. App. Ct. 653, 655, 614 N.E.2d 1027, 1029 (1993) (generally "the elements of an attempt consist of the intent to commit a specific crime, some overt act towards its commission, and failure or interruption"). However, including failure as an element of any attempt charged under G.L. c. 274, § 6 is difficult to reconcile with established rules: (1) that any attempt is a lesser included offense of the substantive crime attempted, see *infra* (failure obviously not being an element of the greater inclusive, substantive crime); and (2) that conviction of a lesser included offense is permissible even if the greater inclusive offense has been proved, see *Gosselin*, 365 Mass. at 120, 309 N.E.2d at 887-888 (attempted escape conviction under G.L. c. 268, § 16 may stand even if escape successful); *Commonwealth v. Dean*, 109 Mass. 349, 351-352 (1872) (assault with intent to rape conviction may stand even if rape completed); *Commonwealth v. Cooper*, 15 Mass. 187 (1818) (same). See also *Commonwealth v. Foley*, 24 Mass. App. Ct. 114, 115, 506 N.E.2d 1160, 1161 (1987) ("A criminal attempt has two elements: (1) a specific intent to commit the substantive offense . . . and (2) an overt act toward its commission . . .").

6. **Lesser included offense of substantive crime.** While it is true that an attempt to commit a crime is a lesser included offense within that substantive crime, *Gosselin*, 365 Mass. at 120-121, 309 N.E.2d at 887-888; *Commonwealth v. Banner*, 13 Mass. App. Ct. 1065, 1066, 434 N.E.2d 1304, 1305 (1982), a defendant may be convicted of attempt as a lesser included offense only if the complaint alleges some overt act constituting the attempt. It may also be necessary that the complaint allege the defendant's specific intent to commit *every* element of the substantive crime (which would not normally be found in a complaint for a substantive offense, even one requiring specific intent as to *some* elements). If the complaint for the substantive crime does not meet those requirements, the defendant may be charged with attempt in a subsequent prosecution, since he or she was not put in jeopardy as to that charge. *Foley*, 24 Mass. App. Ct. at 115-117 & n.5, 506 N.E.2d at 1161-1162 & n.5.