

ATTEMPT

G.L. c. 274, § 6

In this Commonwealth, an attempt to commit a crime is itself a 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 (or steps) toward committing that crime.

The defendant is charged with (attempted) (an attempt to) _____ . If the offense of _____ was completed, the Commonwealth would have to prove ___ elements to obtain a conviction. They are:

[List the elements of the attempted offense.]

Here, because the defendant is only charged with (attempting) (having attempted) to commit the offense, the Commonwealth must prove two things beyond a reasonable doubt:

***First:* That the defendant had a specific intent to commit _____; and**

***Second:* That the defendant took an overt act toward committing that crime and came reasonably close to actually carrying out the crime.**

To prove the first element, the Commonwealth must prove beyond a reasonable doubt that the defendant specifically intended to commit the crime of _____. A person's intent is their purpose or objective. This requires you to make a decision about the defendant's state of mind at that time. You may examine any actions or words of the defendant, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time.

To prove the second element, the Commonwealth must prove beyond a reasonable doubt that the defendant took an overt act toward committing that crime and came reasonably close to actually carrying out the crime. An overt act is some actual, outward, physical *action*, as opposed to mere talk or planning. 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 that crime. Preliminary preparations to commit a crime are not enough.

If the Commonwealth has proved both elements of the offense beyond a reasonable doubt, you should find the defendant guilty. If

the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

SUPPLEMENTAL INSTRUCTION

Additional instruction on the meaning of an overt act.

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 commission of the crime, unless some outside factor intervenes.

The act does not have to make completion of 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) (a person can be guilty of attempted murder even if they did not know the pistol was unloaded when they shot it at someone). But the overt act must be closely linked with actually accomplishing the intended crime. It has to be an act that is not 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. 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), or attempted poisoning (G.L. c. 265, § 28). See G.L. c. 218, § 26.

2. **Two elements of offense.** Appellate courts have repeatedly held that there are two elements to this offense. *Commonwealth v. Sullivan*, 84 Mass. App. Ct. 26, 27 (2013); *Commonwealth v. Rivera*, 460 Mass. 139, 142 (2011); *Commonwealth v. Foley*, 24 Mass. App. Ct. 114, 115 (1987). "The elements of attempt, whether general attempt or attempted murder, are (1) the specific intent to commit the substantive crime at issue, and (2) an overt act toward completion of the substantive crime." *Commonwealth v. LaBrie*, 473 Mass. 754, 764 (2016). Nonachievement of the substantive offense is NOT an element of attempt. See *id.*

3. **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 (1974); *Commonwealth v. Anolik*, 27 Mass. App. Ct. 701, 710-711 (1989); *Commonwealth v. Burns*, 8 Mass. App. Ct. 192, 195 (1979). But retrial is permissible since such a defective complaint does not put the defendant in jeopardy. See *Burns*, 8 Mass. App. Ct. at 198 n.2. Only the overt act or acts alleged in the complaint may be proved to satisfy the requirement of an overt act. *Gosselin*, 365 Mass. at 121; *Commonwealth v. Peaslee*, 177 Mass. 267, 274 (1901). But see *Commonwealth v. Martinez*, 98 Mass. App. Ct. 545, 550-551 (2020) ("with respect to complaints or indictments alleging attempt [to alter, destroy, mutilate or conceal a record document, or other object with the intent to impair the record, document or object's integrity or availability for use in an official proceeding] under G. L. c. 268, § 13E (b), the complaint or indictment need not allege an overt act if the indictment otherwise places the defendant on fair notice of the offense"; holding is narrow and limited to cases brought under G. L. c. 268, § 13E (b) only.)

4. **Proximity to success.** An attempt requires specific intent to commit the substantive crime, coupled with an overt act which need not inevitably accomplish the crime but must come "pretty near" to accomplishing that result. See *LaBrie*, 473 Mass. at 762, quoting *Commonwealth v. Kennedy*, 170 Mass. 18, 20 (1897). "[T]here are two categories of attempt. The first and most obvious form of attempt occurs when a person performs the last act required to complete a crime, but for some unanticipated reason, his or her efforts are thwarted, whether by bad aim or a mistake in judgment. The second, and more complicated category, occurs when a person is still in preparatory mode and has not committed the last act necessary to achieve the crime." *Commonwealth v. McWilliams*, 473 Mass. 606, 610-611 (2016). 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 (1979). "[W]hen further acts on the part of the person who has taken the first steps are necessary before the substantive crime can come to pass... 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]." *Peaslee*, 177 Mass. at 271-272. "Certain factors must be considered when

determining whether acts constitute mere preparations or are enough to establish the crime of attempt. These factors include the gravity of the crime, the uncertainty of the result, and the seriousness of harm that is likely to result.” *McWilliams*, 473 Mass. at 611, citing *Commonwealth v. Van Bell*, 455 Mass. 408, 414 (2009); *Kennedy*, 170 Mass. at 22.

5. **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; *Commonwealth v. Banner*, 13 Mass. App. Ct. 1065, 1066 (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.