Chapter 5.00

ATTEMPTS

Table of Instructions

5.01 ATTEMPT – BASIC ELEMENTS

(1) Count ___ of the indictment accuses the defendant of attempting to commit the crime of _____ in violation of federal law. For you to find the defendant guilty of this crime, you must be convinced that the government has proved both of the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of _____.

(B) And second, that the defendant did some overt act that was a substantial step towards committing the crime of _____.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to _____. But the government does not have to prove that the defendant did everything except the last act necessary to complete the crime. A substantial step beyond mere preparation is enough.

(2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

Committee Commentary 5.01
(current through May 1, 2025)

The elements of attempt identified in paragraphs (1)(A) and (1)(B) (intent to commit the substantive crime and a substantial step towards committing that crime) are supported by United States v. Wesley, 417 F.3d 612 (6th Cir. 2005) and United States v. Bilderbeck, 163 F.3d 971 (6th Cir. 1999). "To convict a defendant of attempt, the government must prove (1) the defendant's intent to commit the criminal activity; and (2) that the defendant committed an overt act that constitutes a 'substantial step' toward commission of the crime." *Wesley* at 618, *citing Bilderbeck* at 975. For the substantial step element, paragraph (1)(C) provides the definition. In *Wesley*, the court gave an instruction virtually identical to paragraph 5.01(1)(C); neither party objected to the instruction, and the court affirmed the conviction as supported by sufficient evidence. *Wesley* at 618 note 2, 620, 622. Judge Batchelder dissented, *id.* at 622-23.

The main purpose of the substantial step element is to provide objective evidence to corroborate the defendant's intent to commit the substantive crime. *Wesley* at 620; *see also* United States v. Alebbini, 979 F.3d 537, 546 (6th Cir. 2020). The court has explained:

> Because of the problems of proving intent in attempt cases and the danger of convicting for mere thoughts, desires, or motives, we require that the substantial step consist of objective acts that mark the defendant's conduct as criminal in nature. The defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to [commit the substantive crime]. The key word . . . is ཞ*objective*ཟ: the ཞsubstantial stepཟ requirement is an objective

> requirement, not a subjective one. In other words, under the "substantial step" analysis, an appellate court evaluates whether any reasonable person could find that the acts committed would corroborate the firmness of a defendant's criminal intent, assuming that the defendant did, in fact, intend to commit the crime.

Bilderbeck at 975, *citing* United States v. Pennyman, 889 F.2d 104, 106-107 (6th Cir. 1989) (cleaned up).

The court has elaborated generally on the elements of attempt. "A substantial step must be something more than mere preparation." United States v. Alebbini, 979 F.3d 537, 546 (6th Cir. 2020), *quoting* United States v. Bailey, 228 F.3d 637, 640 (6th Cir. 2000) (cleaned up). "Evidence is sufficient to sustain a conviction for criminal attempt, if it shows that the defendant's conduct goes beyond preliminary activities and a fragment of the crime was essentially in progress." *Alebbini* at 546-547, *quoting* United States v. Price, 134 F.3d 340, 351 (6th Cir. 1998) (cleaned up). Attempt "is to be construed in a broad and all inclusive manner." *Bilderbeck*, *supra* at 975, *quoting* United States v. Reeves, 794 F.2d 1101, 1103 (6th Cir. 1986) (cleaned up). The proof of the substantial step need not be sufficient to prove the criminal intent, but only to corroborate it; the act and intent are ultimately separate inquiries. *Bilderbeck, supra* at 975.

The court has provided some guidance on the attempt offense applicable to particular offenses. For attempted possession of controlled substances, "when a defendant engages in active negotiations to purchase drugs, he has committed the 'substantial step' towards the crime of possession required to convict him of attempted possession." *Bilderbeck* at 975, *citing Pennyman, supra* at 107-108; United States v. Williams, 704 F.2d 315 (6th Cir. 1983); and United States v. Dworken, 855 F.2d 12, 19 (1st Cir. 1988). For the offense of attempting to provide material support to a foreign terrorist organization, 18 U.S.C. § 2339B(a)(1), the court identified four elements: "(1) that [defendant] intended to commit the crime of providing material support or resources to [a terrorist organization, ISIS]; (2) that he intended to provide himself to ISIS to work under its direction and control; (3) that he knew ISIS was a designated foreign terrorist organization or had engaged in terrorist activity; and (4) that he did some overt act which was a substantial step toward committing the crime." *Alebbini, supra* at 546. In a trial to the court, the *Alebbini* district judge concluded that defendant met the substantial step element when, having purchased two airline tickets to travel to Turkey, he went to the ticket counter at the Cincinnati airport, waited 30 minutes, obtained boarding passes, and headed toward the security area on his way to the gate. The Sixth Circuit affirmed, *Alebbini, supra* at 547.

No defense of withdrawal, abandonment or renunciation exists after the crime of attempt is complete with proof of intent and acts constituting a substantial step toward the substantive offense. United States v. Alebbini, 979 F.3d 537, 548 (6th Cir. 2020), *citing* United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994).

5.02 SHAM CONTROLLED SUBSTANCE CASES

(1) The fact that the substance involved in this case was not real _____ is no defense to the attempt charge. But the government must convince you that the defendant actually thought he was buying [selling] real _____.

(2) The government must show that the defendant's actions uniquely marked his conduct as criminal. In other words, the defendant's conduct, taken as a whole, must clearly confirm beyond a reasonable doubt that he actually thought he was buying [selling] real _____.

Use Note

This instruction should be used when the defendant is charged with an attempted controlled substance offense based on a sale or purchase of sham drugs. This instruction should be given in addition to an instruction outlining the elements of attempt.

If the defendant is charged with buying or selling sham drugs knowing they were sham, the defendant lacks the mens rea for an attempted controlled substances crime and this instruction should not be given.

Committee Commentary 5.02
(current through May 1, 2025)

In United States v. Pennell, 737 F.2d 521, 524-25 (6th Cir. 1984), the Sixth Circuit held that the defendant could be convicted of an attempt to possess a controlled substance even though the substance he purchased from government agents was not real cocaine. The Sixth Circuit agreed with the Third Circuit's analysis in United States v. Everett, 700 F.2d 900, 907-08 (3d Cir. 1983), that "Congress intended to eliminate the impossibility defense in cases prosecuted under 21 U.S.C. §§ 841(a)(1) and 846." *Pennell, supra* at 525. *Accord,* United States v. Reeves, 794 F.2d 1101, 1104 (6th Cir. 1986) ("There can be no question that the Congressional intent in fashioning the attempt provision as part of an all-out effort to reach all acts and activities related to the drug traffic was all inclusive and calculated to eliminate technical obstacles confronting law enforcement officials.").

To convict a defendant in a sham delivery case, the government "must, of course, prove the defendant's subjective intent to purchase (or sell) actual narcotics beyond a reasonable doubt." United States v. Pennell, *supra*, 737 F.2d at 525. And in order to avoid unjust attempt convictions in these types of cases, the Sixth Circuit has held that the following evidentiary standard must be met:

> In order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law.

Id. *Accord*, United States v. Reeves, *supra*, 794 F.2d at 1104 ("This standard of proof has been

adopted in this circuit.").

What this means is that "the defendant's objective conduct, taken as a whole, must unequivocally corroborate the required subjective intent to purchase or sell actual narcotics." United States v. Pennell, *supra,* 737 F.2d at 525. *Accord* United States v. Pennyman, *supra*, 889 F.2d at 106.

The court continues to rely on *Pennell*. *See, e.g.,* United States v. Allen, 1993 WL 445082 at 4, 1993 U.S. App. LEXIS 28778 at 5 (6th Cir. 1993) (unpublished) (quoting the *Pennell* standard).

In sham drugs cases, this instruction alone is not sufficient but is to be given with the instruction setting out the elements of attempt.

An attempted controlled substances offense is only implicated if the defendant believed that the substance involved was a real controlled substance. Thus, if the defendant knew that the substance involved was not a controlled substance but was sham drugs, this instruction is not appropriate. In this situation, *i.e,* the drug is sham and the defendant knows it, the appropriate instruction should be based on 21 U.S.C. §§ 802(32) and 813 (the Controlled Substance Analogue Enforcement Act of 1986).

5.03 ABANDONMENT OR RENUNCIATION

(No Instruction Recommended)

Committee Commentary 5.03
(current through May 1, 2025)

The Committee recommends that no instruction be given.

A panel of the Sixth Circuit has endorsed the approach of Instruction 5.03. In United States v. Tanks, 1992 WL 317179, 1992 U.S. App. LEXIS 28889 (6th Cir. 1992) (unpublished), the district court refused to give an instruction on abandonment. On appeal, the panel stated that a defendant is entitled to instructions only on recognized defenses, and since the abandonment defense was not recognized in the Sixth Circuit, he was not entitled to an instruction. The panel quoted as follows the commentary on Instruction 5.03 from an earlier edition in support of its conclusion that the defense was not recognized:

> No federal cases have explicitly recognized voluntary abandonment or renunciation as a valid defense to an attempt charge. The closest the federal courts have come are two cases which assumed, without deciding, that even if abandonment or renunciation is a defense, the facts of the particular cases did not support a finding that a voluntary abandonment or renunciation had occurred. See United States v. Bailey, 834 F.2d 218, 226-227 (1st Cir. 1987); and United States v. McDowell, 705 F.2d 426, 428 (11th Cir.1983). See generally Model Penal Code § 5.01(4).

Tanks, supra 1992 U.S.App.LEXIS at 16. The panel then stated that the defendant presented insufficient evidence to raise the defense at any rate. *Id.* at 17.

In United States v. Shelton, 30 F.3d 702, 706 (6th Cir. 1994), the Sixth Circuit made clear that it does not recognize the defense of abandonment or renunciation, holding that "withdrawal, abandonment and renunciation, however characterized, do not provide a defense to an attempt crime." The court stated that the crime of attempt is "complete with proof of intent together with acts constituting a substantial step toward commission of the substantive offense," but noted that if a defendant withdraws prior to forming the required intent or taking the substantial step, then the question arises if he has committed the offense since the elements of the crime cannot be proved. *Id*.