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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

MARTIE M. SODERBERG

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Was there sufficient evidence from which a rational jury could convict the defendant of attempted first-degree murder?
2. Did the trial court's failure to sua sponte include "premeditation" in the "to-convict" instruction for attempted first-degree murder constitute error?
3. If the failure to include "premeditation" in the "to convict" instruction was error, was it harmless beyond a reasonable doubt?
4. Did the unobjected-to inclusion of the language "that crime" within the instruction defining attempted first-degree murder constitute error?
5. Was the defendant's constitutional right to jury unanimity violated regarding both charged crimes, if the offenses were continuing in nature, involved the same parties, and involved the same objective intent?
6. Should this Court remand to the trial court to strike the imposition of the \$200 court costs imposed at sentencing?
7. Did the trial court err when imposing the \$100 DNA collection fee and the \$500 victim assessment?

## II. STATEMENT OF THE CASE

Martie Soderberg was convicted by a jury of attempted first-degree murder and solicitation to commit first-degree murder of her husband, Russell Soderberg. CP 132, 137. Ms. Soderberg was sentenced to a standard range sentence; both crimes consisted of the same criminal conduct, and she was sentenced to a total determinate sentence of 180 months. CP 150, 162, 164. This appeal timely followed.

Dennis Bjerke had known the defendant for over 15 years. RP 157. Bjerke also knew Soderberg's husband, as they had worked together at several different businesses. RP 157. The defendant and her husband married in 2002.<sup>1</sup> RP 190. In the summer of 2016, Soderberg asked Bjerke to kill her husband by shooting him on Halloween. RP 160-61. Soderberg commented that she would collect life insurance money after her husband was killed. RP 162. Bjerke told Soderberg that "she was out of her mind" and refused her offer. RP 163. Bjerke had previously witnessed verbal arguments between Soderberg and her husband and described their relationship as unhappy. RP 169-70.

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<sup>1</sup> Mr. Soderberg initially stated he was married to the defendant in 2016, but clarified that the marriage took place in 2002. RP 189-90.

Martin Drake briefly met the defendant in high school. RP 75-76. After high school and approximately twenty years later, Drake reconnected with the defendant through Facebook in early October 2016. RP 78, 80. Drake was homeless at that time. RP 82. Soderberg told Drake that she had been married for 15 years, her husband was abusive, and she was not able to get out of the marriage for financial reasons. RP 84-85.

During their initial get together, Soderberg initiated and discussed several different methods of killing her husband. RP 85. For example, during Halloween, someone could shoot her husband while out trick-or-treating with Soderberg and their children. RP 85. Drake was shaken from Soderberg's plan and remarked to Soderberg that she was "crazy" to have her husband killed in the presence of her children. RP 85-86. On October 11, 2016, after they departed their initial meeting, Drake contacted the Spokane Valley Police; he was extremely nervous and upset. RP 10-11, 86, 92-93.

A search warrant was subsequently authorized to record and intercept<sup>2</sup> conversations between Drake and Soderberg and a meeting was arranged between the two for October 12, 2016. RP 23, 26. On that date, Soderberg picked Drake up in her car at a Walmart in the Spokane Valley,

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<sup>2</sup> The recording device was a cell phone equipped with special software and the receiving device was also a cell phone. RP 24-25.

the pair drove around Spokane Valley and the Hillyard area in Spokane, and then returned to the Walmart. RP 27-30. During that outing and recorded conversation, Soderberg remarked that she had previously asked and made plans with her friend, Dennis Bjerke, over the course of one-year to kill her husband, but those plans never materialized, so Soderberg shared her alternative plans to kill her husband with Drake. RP 32-33, 101, 136. Soderberg told Drake there was a \$300,000 life insurance policy on her husband, in addition to a Labor and Industries settlement she would collect after her husband was killed.<sup>3</sup> RP 88.

Detective John Oliphant summarized part of that conversation:

These plans consisted of occurring on Halloween night to the point where, you know, [her husband] was shot in front of his kids on Halloween ..., and then also shooting him at work, scouting it out at work, figure out what the escape routes were, using a gun. She brought up the fact that her insurance – insurance settlement would be about \$300,000 from her husband's life insurance policy, that it was immediately payable, that she made sure it was immediately payable. She talked about going over the insurance policy with Mr. Drake to make sure there was no, you know, fine print that would prohibit a payout.

RP 33-34.

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<sup>3</sup> Soderberg later remarked to Drake that she had three different insurance policies on her husband that she would collect after he was killed. RP 106.

Soderberg and Drake considered other ideas, including having Soderberg's husband killed at a rest stop, or killing him at his shop against the backdrop of a fake robbery or burglary; the pair also discussed the need to locate a firearm, how it should be disposed of, including burying it in cement, and potential alibis. RP 34-35. Additionally, Soderberg told Drake that she had "thought of everything" and wanted to purchase a wig for him to alter his appearance at the time of the murder. Ex. P-7 at 03:40-03:56.

Soderberg further commented to Drake that they could get married "down the road," and inquired whether Drake could still have children. RP 89, 97-98, 105-06. Soderberg wanted someone else to murder her husband so that she could establish an alibi. RP 89-90. Soderberg proposed that Drake would wear disposable clothing in the event gun residue collected on his clothing and the gun would be placed in cement, in a bucket, with Drake mixing the cement with his hands to collect any remaining residue. RP 99. There was also a conversation, between the two, on how to acquire a firearm, including Soderberg giving Drake \$50 to purchase a firearm to kill her husband. RP 88-89, 97.

During their dialogue, Soderberg exclaimed: "it's sad but, yep, trust me, if I knew I could get away with doing it myself, it would have already f[--]king been done[,]" and "but I already know that there's no possible way because the first person is the spouse, they always go right back to the

spouse so I was like, f[--]k, screwed, can't -- and then my next option was to do a for-hire thing.” RP 224.

Due to logistical problems, another meeting between Soderberg and Drake was not arranged and recorded until October 17, 2016, in which Drake asked Soderberg to bring \$50. RP 46-47. On that day, Drake met Soderberg at a business in the Spokane Valley; again, Drake was wired and the meeting was witnessed by law enforcement. RP 47-49. During the meeting, Soderberg gave Drake the requested \$50 for the firearm and showed him an insurance policy on her husband. RP 49-50, 65, 108.

Soderberg was subsequently arrested and search warrants for her vehicle and residence were authorized. RP 52. During the search of the defendant's vehicle, Detective Oliphant located a life insurance policy. RP 53-54. The defendant claimed during cross-examination that the insurance policy in the vehicle was a coincidence. RP 227.

### **III. ARGUMENT**

#### **A. SUFFICIENT EVIDENCE EXISTS FROM WHICH A RATIONAL JURY COULD FIND THE DEFENDANT GUILTY OF ATTEMPTED FIRST-DEGREE MURDER.**

The defendant challenges the sufficiency of the evidence for the attempted first-degree murder conviction regarding her husband, arguing the evidence did not show she took a substantial step toward commission of that crime.

Standard of review.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020(1); *State v. Nelson*, 191 Wn.2d 61, 71, 74, 419 P.3d 410 (2018); CP 1191 (instruction); RP 4138. A person commits first-degree murder when, “[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.” RCW 9A.32.030(1)(a). Intent may be inferred from the defendant’s conduct. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A “substantial step” is defined as conduct that is “strongly corroborative of the actor’s criminal purpose.”<sup>4</sup> *In re Borrero*,

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<sup>4</sup> To the extent Soderberg argues the standard of review of “substantial evidence” is whether there is “clear, cogent, and convincing” evidence, this clearly is not the standard on review. Appellant’s Br. at 25-26. Soderberg relies on *In re A.V.D.*,

161 Wn.2d 532, 539, 167 P.3d 1106 (2007); CP 1193 (instruction); RP 4138. In *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), *superseded by statute on other grounds by State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981), the Supreme Court adopted the Model Penal Code (MPC) definition of a “substantial step.” *Id.* at 452. In doing so, the Court approved the list as contained in the MPC of what conduct constitutes a “substantial step.” *Id.* at 451-52 n. 2 (quoting MPC § 5.01(1)(c) (Proposed Official Draft, 1962)). The MPC’s list of conduct was drafted for the express purpose of drawing a line separating a criminal attempt from mere preparation.<sup>5</sup> MPC § 5.01 at 297 (*see*, Attach. A at A-7, explanatory note).

According to the MPC, acts strongly corroborative of a defendant’s criminal purpose include lying in wait, searching for or following the intended victim of the crime, enticing or seeking to entice the intended

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62 Wn. App. 562, 568, 815 P.2d 277 (1991), where the court found the findings required to terminate a parent-child relationship must be established by “clear, cogent, and convincing evidence.” RCW 13.34.190(1)(a)(i). Where a party is required to establish its case by “clear, cogent, and convincing evidence,” a reviewing court incorporates that standard of proof into its review. *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012). However, in criminal cases, both the substantial step and the intent must be established beyond a reasonable doubt for a conviction to lawfully follow. *State v. Aumick*, 126 Wn.2d 422, 429-30, 894 P.2d 1325 (1995).

<sup>5</sup> Attached is a copy of pages 293-298 (§ 5.01 with Explanatory Note) and pages 329-354 (Comment 6) from Model Penal Code and Commentaries: Part 1 (1985).

victim to the planned site of the crime, reconnoitering the planned site of the crime, unlawfully entering the place where the actor intends to commit the crime, or possessing materials to be used in the crime that can serve no lawful purpose of the actor under the circumstances, or soliciting an “innocent agent to engage in conduct constituting an element of the crime.” *Workman*, 90 Wn.2d at 451-52 n. 2 (citing MPC § 5.01(2)(a)-(e), (g)). This broad “substantial step” definition gives police the flexibility to intervene to prevent a crime when the defendant’s criminal intent becomes apparent. *Id.* at 452. According to one academic, “The actus reus of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of the specific crime, and the doing of such act can have no other purpose than the commission of that specific crime.” Wayne R. LaFare, 2 SUBSTANTIVE CRIMINAL LAW § 11.4(d) (3d ed. 2017).

For example, in *State v. Gay*, 4 Wn. App. 834, 841, 486 P.2d 341, *review denied*, 79 Wn.2d 1006 (1971), the court observed:

The fundamental reason back of the requirement of an overt act is that until such act occurs there is too much uncertainty that a criminal design is to be apparently carried out. When the conduct of the defendant becomes unequivocal and it appears that the design will be carried into effect if not interrupted, we have a condition that meets the test of overt acts intended to accomplish the target crime... When the

intent to commit the target crime<sup>6</sup> is clearly shown, slight acts in furtherance thereof will constitute an attempt.

(Citation omitted.)

In *Gay*, a wife paid a \$1,000 retainer to another to kill her husband and agreed to pay the killer an additional \$9,000 when her husband was dead. She furnished the killer with pictures of her husband so that he would kill the right man and told him about her husband's habits and where he could be found. In upholding her conviction for attempted murder, the court acknowledged that mere solicitation, which involves no more than asking or enticing someone to commit a crime, would not constitute the crime of attempt. However, the court declared that the very act of hiring a contract killer is an overt act directed toward the commission of the target crime. *Id.* at 840.

The court concluded that the defendant's attempt to murder her husband was clearly established by the following undisputed evidence: (1) obtaining a forged signature of her husband on a life insurance policy

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<sup>6</sup> Marital discord between the defendant and victim can establish motive and intent to commit a murder. *See State v. Powell*, 126 Wn.2d 244, 247, 893 P.2d 615 (1995). Generally, motive is relevant to a homicide prosecution. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). Motive is the impulse that tempts or induces a person to commit a crime. *Powell*, 126 Wn.2d at 259-60; *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). Evidence of previous quarrels and assaults against the same victim is admissible when motive is relevant to the current offense. *Powell*, 126 Wn.2d at 260.

for her husband six months before she hired a man to kill her husband, (2) the payment of premiums on her husband's \$50,000 life insurance policy after the divorce had commenced, without the knowledge of her husband, and (3) the hiring of an apparent hired gun. *Id.* at 841.

Similarly, in *State v. Kilgus*, 128 N.H. 577, 519 A.2d 231 (1986), the court held that the defendant's solicitation of a third party to kill the victim constituted attempted murder, where the defendant had completed all the preliminary steps, including setting and paying the contracted-for sum, identifying the victim, and instructing the "killer" that the corpse must be found outside the state. The New Hampshire Supreme Court concluded, "[t]his was more than ... 'mere' or 'naked' solicitation. It was a 'substantial step' toward the commission of capital murder." *Id.* at 585.

Likewise, in *State v. Burd*, 187 W.Va. 415, 419 S.E.2d 676 (1991), the court ruled that evidence that the defendant solicited the murder of her boyfriend's wife and child, hired the killer, gave him money for a weapon and an advance on the murder contract, drew a map of the residence of the planned victims, and instructed the killer on how to shoot the victims, supported her conviction for attempted murder. The court reasoned that other "jurisdictions in similar situations have also found that when an act, whether it be payment of a sum of money, delivery of a weapon, or visiting the scene of the intended crime, accompanies conversation and planning

concerning the crime, there exists evidence of an overt act because such combination demonstrates the seriousness of [the] purpose, and mak[es] the planned crime closer to fruition.” *Id.* (internal quotations and citations omitted) (alterations in original).

Similarly, in *State v. Molasky*, 765 S.W.2d 597 (Mo. 1989), relying on the Model Penal Code, the court reversed a conviction for attempted murder, but only because the conduct consisted solely of a conversation, unaccompanied by any affirmative acts. *Id.* at 602. Thus, the court reasoned, “a substantial step is evidenced by actions, indicative of purpose, not mere conversation standing alone.” Acts evincing a defendant’s seriousness of purpose to commit murder, the *Molasky* court suggested, might be money exchanging hands, concrete arrangements for payment, delivering a photograph of the intended victim, providing the address of the intended victim, furnishing a weapon, visiting the crime scene, waiting for the victim, or showing the hit man the victim’s expected route of travel. *Id.*

In the present case, Soderberg clearly had the intent and motive to commit the act of murder against her husband and she took steps in furtherance of that crime which constitute an attempt. Ultimately, Soderberg directed Drake to purchase a firearm and gave him \$50 to do so. She had taken every step under her control and, according to her plan, to obtain a firearm to be used in the eventual and planned murder of her

husband. Furthermore, by directing Drake on how to commit the murder (*e.g.*, shooting the victim with a firearm as opposed to other weapons or other forms of killing, to wear disposable clothing during the murder, depositing of the murder weapon in cement, and, alternative plans included having Drake conduct a fake robbery or burglary at the victim's shop, shooting the victim on Halloween, or at a rest stop, instructing Drake to wear a disguise, and a discussion of alibis to be used after the murder was completed by Drake), Soderberg "solicit[ed] ... [Drake] to engage in conduct constituting an element of the crime." *See* MPC § 5.01(2)(g). Here, the attempted premeditated murder of her husband.

Providing Drake with money to buy a gun to commit the murder, the detailed planning of how the murder would be committed, and requesting Drake engage in conduct which would constitute murder established a "substantial step" toward the commission of first-degree murder.<sup>7</sup> In sum, a jury could reasonably find the defendant took a substantial step toward the commission of first-degree murder against Mr. Soderberg.

To the degree that Soderberg argues that she did not attempt to commit murder because she had to wait one or two months to kill her

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<sup>7</sup> Soderberg's affirmative acts also included the enticement of a possible later marriage with Drake as an additional persuasion.

husband to collect on the already purchased life insurance policies belies the “substantial steps” taken by her in furtherance of the crime of first-degree murder. In that regard, Soderberg’s argument is contrary to the comments to section 5.01 of the MPC, “[t]hat further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial.” MPC § 5.01, cmt. 6(a) (1985) (*see* Attach. A at A-9–A-11). As explained by a Georgia court, “[t]he ‘substantial step’ requirement shifts the emphasis from what remains to be done to what the actor has already done. The fact that further steps must be taken before the crime can be completed does not preclude such a finding that the steps already undertaken are substantial.” *English v. State*, 301 Ga. App. 842, 843, 689 S.E.2d 130 (2010).

For example, in *State v. Daniel B.*, 331 Conn. 1, 20, 201 A.3d 989 (2019), the Connecticut Supreme Court held that the determination of what conduct constitutes a substantial step for purposes of criminal attempt focuses on what the actor has already done rather than on what the actor has left to do to complete the substantive crime. In that case, the evidence was sufficient to support a finding that the defendant took a substantial step towards hiring a hit man to murder his soon to be ex-wife, supporting his conviction for attempted murder; notwithstanding that the defendant never paid the hit man. The jury heard evidence that the defendant described to

the undercover hit man a plot that he thought would be the best way to accomplish the murder of his wife, and provided him with an alibi to divert suspicion away from him.

Although only a little more than 24 hours took place between the defendant's first call to a friend to ask if he knew a hit man and his arrest, the 24-hour period culminated in defendant's driving to a rest area to meet a complete stranger whom he believed was a hit man willing to kill his wife, getting into his car, giving the hit man information about how to locate his wife, showing him a photograph of her and setting up a structured payment plan. By hiring a hit man, the defendant took a substantial step to achieve his goal of killing his wife.

In the present case, sufficient evidence supports the jury's verdict that the defendant took a substantial step toward the commission of first-degree murder against her husband when she gave Drake \$50 to purchase a firearm to complete the murder, even though Soderberg claimed she had to wait one to two months to complete the murder of her husband.

**B. VIEWING THE JURY INSTRUCTIONS IN THEIR ENTIRETY, THE ELEMENTS INSTRUCTION WAS SUFFICIENT. EVEN IF THERE WAS ERROR, IT WAS HARMLESS.**

Soderberg argues the court's "to convict" instruction number 9, regarding the elements of attempted first-degree murder, was deficient

because it omitted “premeditation” as an element. *See* CP 117. The court’s instruction number “9” stated, in pertinent part:

To convict the defendant of the crime of attempted murder in the first degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about between October 11, 2016 and October 17, 2016 the defendant did an act that was a substantial step toward the commission of murder in the first degree;
- (2) That the act was done with the intent to commit murder in the first degree; and
- (3) That the act occurred in the State of Washington.

CP 117.

Instruction number 10 defined a completed first-degree murder:

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person.

CP 118.

Instruction number 11 defined premeditation:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 119.

Soderberg did not object to the “to convict” instruction in the trial court. An allegation that a jury instruction omitted an element of a charged crime can constitute “a manifest error affecting a constitutional right,” which can be considered for the first time on appeal under RAP 2.5(a). *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003).

Soderberg’s argument was addressed and dismissed by Division Two in *State v. Reed*, 150 Wn. App. 761, 208 P.3d 1274, *review denied*, 167 Wn.2d 1006 (2009). The court held that the essential elements of attempt are (1) the specific intent to commit a crime and (2) a substantial step toward committing that crime. *Id.* at 772-73. The court explained:

Reed’s argument conflates the intent necessary to prove an attempt with that necessary to prove first degree murder. The State did not charge Reed with completed first degree murder; thus, to prove only an attempt to commit first degree murder, the State was not required to prove that Reed acted with premeditated intent to commit murder, only that he attempted to commit murder.

*Id.*; accord *State v. Besabe*, 166 Wn. App. 872, 883, 271 P.3d 387 (2012) (Division One). The court held the jury instructions properly instructed the jury on the essential elements of attempted first-degree murder.<sup>8</sup>

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<sup>8</sup> This scenario is different from a failure to include “premeditation” in the charging document. *See, e.g., State v. Vangerpen*, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995) (finding an amendment to the information after both sides had rested to include the statutory word “premeditation” was reversible error). Although not raised, the information in the present case included “premeditation” in the information for attempted first-degree murder. CP 99-100.

150 Wn. App. at 774-75. In the present case, *Reed* and *Besabe* are controlling.<sup>9</sup>

Even if this Court determines it was error to omit “with premeditation” from the elements instruction, such error was harmless. Jury instructions that relieve the State of its burden to prove every element are erroneous. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, erroneous jury instructions that omit an element of the charged offense or that misstate the law are subject to a harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); *State v. Rivera-Zamora*, ---Wn. App.---, 435 P.3d 844, 846 (2019).

According to *Neder*, instructional errors that arguably “preclude” the jury from finding an element of an offense are analogous to the erroneous admission or exclusion of evidence at trial for purposes of determining whether the constitutional error is harmless. 527 U.S. at 17-18. The *Neder* Court observed, this test does not depend on proof that the jury

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<sup>9</sup> During the State’s closing argument, the deputy prosecutor discussed the need for the jury to find premeditation in order to find the defendant guilty of attempted first-degree murder and argued that the facts supported premeditation. RP 306-07.

actually rested its verdict on the proper ground, but rather on proof beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.* at 17-18. The *Neder* test for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the complained of error did not contribute to the verdict. *Thomas*, 150 Wn.2d at 845. As it pertains to the omissions or misstatements of elements in jury instructions, the error is deemed harmless if uncontroverted evidence supports that element. *Id.* An appellate court makes this determination reviewing the entire record. *Brown*, 147 Wn.2d at 341.

Applying *Neder* and *Brown* to the present case, the asserted instructional error was harmless if the evidence was uncontroverted that Soderberg “premeditated” her attempt to kill her husband. To prove premeditation, the State must show “deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.” *State v. Condon*, 182 Wn.2d 307, 320, 343 P.3d 357 (2015).

Notwithstanding that the jury was instructed that Soderberg had to take a “substantial step” toward the completion of first-degree murder, that the completed crime of first-degree murder required premeditation, and premeditation was defined by the court, the uncontroverted evidence was

such that a reasonable jury would have found beyond a reasonable doubt that Soderberg premeditated the attempted murder of her husband. It is illogical to presume that hiring a “hit man” in this case did not establish the necessary premeditation element.

In that regard, Soderberg admitted she would kill her husband if she could get away with it. Furthermore, not once, but twice, Soderberg contacted two different individuals to kill her husband claiming her husband was abusive and that she would collect the insurance proceeds if he was killed. She also extensively planned how the crime would be carried out, the weapon to be used, the use of a disguise, disposal of the weapon, and the potential alibis to be used once her husband was killed. A reasonable jury would have found beyond a reasonable doubt that Soderberg premeditated the attempted murder of her husband.

If this Court determines the “to convict” instruction for attempted first-degree murder was insufficient regarding “premeditation,” it can “reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.”<sup>10</sup>

RAP 12.2. If this Court finds error, the State is requesting this Court remand

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<sup>10</sup> In the event this Court reverses the attempted first-degree murder conviction, an alternative remedy is to dismiss without prejudice and allow the State to elect to recharge the defendant with an amended information and retry her on attempted first-degree murder. *See State v. Brown*, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); *City of Auburn v. Brooke*, 119 Wn.2d 623, 639, 836 P.2d 212 (1992).

for entry of a judgment on the lesser degree crime of attempted second-degree murder.

If this Court determines that the jury was not properly instructed regarding “premeditation” and the error was not harmless, Soderberg’s real complaint is that she could *only* be convicted of attempted second-degree murder. A person commits attempted second-degree murder if, with intent to commit murder, “he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1); *see also* WPIC 100.01; CP 99-100 (amended information). A person commits second-degree murder when “[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person.” RCW 9A.32.050(a).

Here, at the request of Soderberg, the jury was necessarily instructed on, and found, the elements of the inferior crime of attempted second-degree murder (attempted intentional killing) were proved beyond a reasonable doubt, when it found the defendant guilty of the greater offense of attempted first-degree murder. CP 123-24. Moreover, the defendant was on notice that she could be convicted of an inferior degree crime. *See* RCW 10.61.003; *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979). Soderberg’s trial strategy was that she did not commit the charged crimes, and it would be no different when defending against either attempted first-degree murder or

attempted second-degree murder. She cannot establish any harm or resulting prejudice.

The jury necessarily found the elements of attempted second-degree murder when it found the defendant guilty of attempted first-degree murder. “Intent to kill” was satisfied by the trial court’s instructions’ number 10 (definition of first-degree murder – including “intent to kill”), number 11 (definition of “premeditation” requires a defendant to “form an intent to take human life”), number 13 (“intent” defined), number 8 (definition of attempted first-degree murder), and number 9 (“to convict” instruction for attempted first-degree murder). *See* CP 116-21.

Therefore, if this Court determines the instructions were inadequate regarding “premeditation” for attempted first-degree murder, the State requests this Court remand that count with instructions for the trial court to enter a judgment of attempted second-degree murder. *See generally In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012) (remand for entry of a judgment on lesser offense is appropriate where jury was instructed on and found the elements of the lesser offense).

**C. ALLEGED ERROR PERTAINING TO THE INSTRUCTION DEFINING ATTEMPTED FIRST-DEGREE MURDER CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.**

For the first time on appeal, Soderberg argues the instruction which defined attempted first-degree murder incorrectly defined that offense. The trial court's instruction number "8" read as follows:

A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

CP 116.

Soderberg contends that by using the term "that crime," the instruction only required the jury to find her guilty of murder, despite instruction number "8" *only* referencing attempted first-degree murder.

Standard of review.

An appellate court reviews challenged jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

1. The alleged error is unpreserved.

Under RAP 2.5(a), a claim on appeal is waived if the party failed to make the argument at trial. RAP 2.5(a). However, a defendant may assert error not properly preserved at trial if it is a manifest constitutional error. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Instructional errors are of constitutional magnitude only where the jury is not instructed on every element of the

charged crime. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992). “As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” *Id.* “Even an error in defining technical terms does not rise to the level of constitutional error.” *Id.*

Here, the trial judge instructed the jury as to the elements of attempted first-degree murder. The alleged error regarding the definitional instruction does not rise to the level of manifest constitutional error and this Court should decline to review the claimed error. *See, e.g., State v. Burns*, No. 95528-0, 2019 WL 1747036, at \*9-10 (Wash. Apr. 18, 2019) (explicitly adopting “a requirement that a defendant raise an objection at trial or waive the right of confrontation. Requiring an objection brings this claim to align with what [the Court] employ[s] in other cases where we have held that some constitutional rights may be waived by a failure to object”).

2. The definitional instruction for attempted first-degree murder accurately stated the law.

If this Court determines the alleged error should be considered, the trial court’s instruction defining attempted first-degree murder was not misleading as described below.

“An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that

crime.” *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003); *see also* RCW 9A.28.020(1). Here, the trial court’s elements instruction directed the jury that in order to convict Soderberg of “attempted first degree murder,” it had to find beyond a reasonable doubt that she “did an act which was a substantial step toward the commission of murder in the first degree.” Reading the court’s definitional instruction and the elements instruction together, the jury was properly instructed as to every element of the crime of attempted first-degree murder. A jury is presumed to follow the court’s instructions. *State v. Sanchez*, 122 Wn. App. 579, 590, 94 P.3d 384 (2004).

Soderberg’s reliance on *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997), is misplaced. *Smith* involved a misstatement of the law in the “to convict” instruction. *Id.* at 262 (emphasis added). In *Smith*, the defendant was charged with conspiracy to commit murder in the first-degree. The “to-convict” instruction actually misstated the elements of conspiracy to commit murder by stating the wrong crime as the underlying crime that the conspirators agreed to carry out. Instead of stating the underlying crime as the “crime of Murder in the First Degree,” the instruction stated it as the “crime of Conspiracy to Commit Murder in the First Degree.” *Id.* In effect, it defined conspiracy to murder as a conspiracy to conspire to commit murder, which was inaccurate.

Both parties in *Smith* agreed that the instruction was defective, and our Supreme Court ordered a new trial. The Court concluded that an instruction which “purports to be a complete statement of the law yet states the wrong crime as the underlying crime which the conspirators agreed to carry out” was constitutionally defective because it relieved the State of the burden of proving that Smith conspired to commit murder and the error was not cured by other definitional instructions. *Id.* at 263.

Here, the controlling case is not *Smith*, but *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006), *abrogated on other grounds by State v. Grier*, 171 Wn.2d at 17, 38, 246 P.3d 1260 (2011), in which the court rejected an argument identical to Soderberg’s assertion. Pittman was convicted of attempted residential burglary. The court instructed the jury, “[a] person commits the crime of attempted residential burglary when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of *that crime*.” *Id.* at 381 (emphasis added). On appeal, the defendant argued that this instruction was error because it “allowed the jury to convict him if it found he took a substantial step towards the commission of attempted residential burglary, rather than a

substantial step toward residential burglary.” Pittman’s argument was based on *Smith*, which was rejected by the appellate court:

This case is distinguishable from *Smith* because instruction 5 [definition of residential burglary] is not clearly erroneous. Reading the instruction in a straightforward, commonsense manner, the average juror would interpret “that crime” to mean residential burglary as the parties intended. Even if instruction 5 were somehow confusing, the crucial “to convict” instruction properly asked the jury whether Pittman “did an act which was a substantial step toward commission of residential burglary,” not whether he did an act which was a substantial step toward commission of attempted residential burglary. Pittman does not dispute that the “to convict” instruction accurately listed all the essential elements of attempted residential burglary. Nor does he dispute that instruction 8 accurately defined the crime of residential burglary. The jury instructions as a whole properly informed the jury of the applicable law. The alleged inadequacies in instruction 5 did not result in practicable and identifiable consequences, so Pittman cannot show manifest error reviewable for the first time on appeal.

*Pittman*, 134 Wn. App. at 382-83. In this case, the same form of definitional and “to convict” instructions were given, as in *Pittman*. The same reasoning of *Pittman* applies here. Soderberg cannot establish the definitional instruction combined with the elements instruction were clearly erroneous nor can she establish manifest error reviewable for the first time on appeal.

**D. NO UNANIMITY INSTRUCTIONS WERE REQUIRED FOR THE CHARGED CRIMES.**

Soderberg contends, for the first time on appeal, that her right to a unanimous jury verdict was violated because no unanimity instruction was

given with respect to the attempted first-degree murder and the solicitation to commit first-degree murder.

“To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act.” *State v. Bobenhouse*, 166 Wn.2d 881, 892, 214 P.3d 907 (2009). When the evidence indicates that several *distinct* criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, jury unanimity must be protected. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (emphasis added), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 406 n. 1, 756 P.2d 105 (1988), *abrogated in part on other grounds by In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014). To protect unanimity, either the State may elect the act upon which it relies for conviction, or the jury must be instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *State v. Barrington*, 52 Wn. App. 478, 480, 761 P.2d 632 (1988). A trial court’s failure to give such a unanimity instruction when warranted violates a defendant’s state constitutional right to a unanimous jury verdict and the United States constitutional right to a jury trial. *Kitchen*, 110 Wn.2d at 409.

1. RAP 2.5.

Here, no unanimity instruction was proposed by the defendant nor did she object or take exception to the court's instructions (other than the concluding instruction), which did not include a unanimity instruction. RP 271-73. The failure to provide a unanimity instruction where required is a manifest constitutional error that a party may raise for the first time on appeal. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). However, in this case, the failure to assert this issue at the trial court is not reviewable because there is not a showing that the alleged error is manifest.

It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *cf.*, *Burns*, 2019 WL 1747036, at \*10 (defendant waived his right to raise a confrontation clause violation on appeal when he did not object on that ground at trial).

This principle is expressed in Washington under RAP 2.5. which “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports

a basic sense of fairness, which requires objections to prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

*Id.* at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.<sup>11</sup> Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

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<sup>11</sup> Not alleged here, an issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

Soderberg's failure to assert this issue at the trial court is not reviewable on appeal because there is not a showing that the alleged error is manifest.

2. Manifest error.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is "manifest." Here, any alleged error relating to the trial court's failure to extemporaneously supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

*O'Hara*, 167 Wn.2d at 99-100 (footnote and internal citation omitted) (emphasis added).

There is nothing in defendant's claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have clearly noted a unanimity violation and remedied it.

Here, the fact that the defendant attempts to argue that this case is a “multiple acts” and not a “continuing course of conduct” case demonstrates that the issue is *debatable* and therefore not *manifest* – not obvious or flagrant as is required by RAP 2.5 for this Court to grant review absent preservation of the issue for appeal by timely objection at trial. This Court should decline to review this claim.

If this Court determines that Soderberg committed several distinct acts with respect to each crime, the State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a continuing course of conduct.<sup>12</sup> *State v.*

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<sup>12</sup>The crime of attempted first-degree murder and solicitation to commit first-degree murder have different legal elements and each requires proof of a fact that the other does not. *State v. Jensen*, 164 Wn.2d 943, 949, 195 P.3d 512 (2008); *Gay*, 4 Wn. App. at 839-40. A person commits the crime of first-degree murder when, with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). To convict of an attempt, the State must prove both intent to commit the crime and a substantial step toward its commission. RCW 9A.28.020(1); *Aumick*, 126 Wn.2d at 429. Thus, a person commits first-degree attempted murder when, with premeditated intent to cause the death of another, he or takes a substantial step toward commission of the act. *State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

To prove the crime of solicitation to commit murder in the first-degree, the State was required to demonstrate that Soderberg offered to give money or some other thing of value to another to engage in conduct constituting first-degree murder. RCW 9A.28.030(1); *Jensen*, 164 Wn.2d at 949. Moreover, solicitation alone, which “involves no more than asking or enticing someone to commit a crime,” does not constitute the crime of attempt. *Gay*, 4 Wn. App. at 839-40.

*Handran*, 113 Wn.2d 11, 17, 775 P.2d 453, 456 (1989). To determine whether several criminal acts constitute a continuing course of conduct, the facts must be evaluated in a “commonsense manner,” considering (1) the time separating the criminal acts and (2) whether the acts involved the same parties, location, and ultimate purpose. *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

When several criminal acts occur over the course of several days and involve the same parties, location, and ultimate purpose, the acts may be considered the same criminal conduct. *Id.* at 7, 13-15. Likewise, evidence that a defendant engaged in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts. *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

Here, the defendant’s argument fails because under a commonsense evaluation of the facts, the several acts supporting the charged crimes, as committed by the defendant, constituted a continuing course of conduct. For both counts, the acts occurred during a relatively short time frame – between October 11, 2016 and October 17, 2016 – and involved the same parties – Soderberg, her husband Russell, and Drake. Moreover, the defendant’s actions and behavior remained consistent throughout this period with the same motive and objective criminal purpose – to kill her husband.

Soderberg continued to entice Drake (who was homeless at the time) to commit the crime with continued assurances of a large insurance payoff after Mr. Soderberg was killed and with the draw of a presumable marriage to Soderberg after the intended murder. Indeed, Soderberg brought the life insurance policy on her husband to the meeting when she gave Drake the \$50 to buy the firearm, so that Drake could review the policy and be reassured there would be large payoff after the murder and that he would be paid for his intended criminal conduct.<sup>13</sup>

Finally, if error, it was invited. Soderberg should be precluded from raising this claimed error because she contributed to it at the time of trial. A party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires

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<sup>13</sup> To the extent that Soderberg argues no money exchanged hands, the solicitation statute only requires that a person “offers to give money or some other thing of value to another to engage that person to commit a crime.” *State v. Varnell*, 162 Wn.2d 165, 169, 170 P.3d 24 (2007) (emphasis added). “Solicitation involves no more than asking someone to commit a crime in exchange for something of value.” *Jensen*, 164 Wn.2d at 952.

“affirmative actions by the defendant.” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Under the “invited error” doctrine, a defendant may not make a tactical choice in pursuit of some real or hoped-for advantage and later urge his own action as a ground for reversal. *State v. Lewis*, 15 Wn. App. 172, 176, 548 P.2d 587 (1976), *overruled on other grounds by State v. Stephens*, 22 Wn. App. 548, 591 P.2d 827 (1979). Here, defense counsel proposed instructions, did not request a *Petrich* instruction, and did not object or take exception to the court’s instructions (other than to the concluding instruction). CP 60-72 (defendant’s proposed instructions); RP 272-73. There was no error. If there was error, it was invited.

**E. IF THIS COURT EXERCISES ITS DISCRETION TO REVIEW THE DEFENDANT’S CLAIMS REGARDING HIS LEGAL FINANCIAL OBLIGATIONS, THE COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE \$200 COURT COSTS AND TO DETERMINE WHETHER THE DEFENDANT’S DNA WAS PREVIOUSLY COLLECTED.**

The court imposed the \$200 criminal filing fee, \$100 DNA collection fee, and \$500 victim assessment. CP 327; RP 497. Soderberg argues this Court should order the trial court to strike the imposition of the \$200 filing fee, and the \$100 DNA fee imposed at sentencing.

1. Court costs.

In 2018, House Bill 1783 amended the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit courts from imposing the \$200

filing fee on indigent defendants. Laws of 2018, ch. 269, § 17 (2)(h). As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; Laws of 2018, pg. ii, “Effective Date of Laws.”

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high Court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747. In the present case, the defendant was sentenced on May 11, 2018, and was pending direct review at the time of the legislative amendments. Thus, this Court should order that the \$200 court cost be stricken from judgment and sentence; this may be done without a resentencing. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant’s presence).

## 2. DNA collection.

Regarding the collection of Soderberg’s DNA, it does not appear she has any previous felony convictions where her DNA would have been drawn. CP 174-75 (Appendix of Criminal History). House Bill 1783 also established that the DNA database fee is mandatory only if the offender’s DNA has not been previously collected as a result of a prior conviction.

Laws of 2018, ch. 269, § 18; *see also* RCW 43.43.7541.<sup>14</sup> Soderberg provides no evidence that her DNA was previously collected. Consequently, Soderberg has not shown that, under RCW 43.43.7541, the trial court erred in imposing the DNA collection fee.

3. Victim assessment.

The trial court is not required to make an individualized inquiry to impose mandatory LFOs, including the \$500 victim penalty assessment. *See State v. Catling*, No. 95794-1, 2019 WL 1745697, at \*3 (Wash. Apr. 18, 2019); *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); *State v. Mathers*, 193 Wn. App. 913, 918-24, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016); *State v. Seward*, 196 Wn. App. 579, 585-86, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015 (2017). The \$500 victim assessment fee is mandatory under HB 1783. *Catling*, 2019 WL 1745697, at \*3. Here, the trial court did not err when it imposed the \$500 victim penalty assessment.

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<sup>14</sup> “Every sentence imposed for a crime specified in RCW 43.43.754 [i.e., any felony] must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.” Laws of 2018, ch. 269, §18.

#### IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the convictions of attempted first-degree murder and solicitation to commit first-degree murder.

Dated this 7 day of May, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

# ATTACHMENT A

**MODEL PENAL CODE**  
**AND**  
**COMMENTARIES**  
(Official Draft and Revised Comments)

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With text of Model Penal Code as adopted  
at the 1962 Annual Meeting of  
The American Law Institute  
at Washington, D.C., May 24, 1962

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**PART I**  
**GENERAL PROVISIONS**  
§§ 3.01 to 5.07

PHILADELPHIA, PA.  
THE AMERICAN LAW INSTITUTE  
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**ARTICLE 5. INCHOATE CRIMES**

- 5.01 Criminal Attempt
- 5.02 Criminal Solicitation
- 5.03 Criminal Conspiracy
- 5.04 Incapacity, Irresponsibility or Immunity of Party to Solicitation or Conspiracy
- 5.05 Grading of Criminal Attempt, Solicitation and Conspiracy; Mitigation in Cases of Lesser Danger; Multiple Convictions Barred
- 5.06 Possessing Instruments of Crime; Weapons
- 5.07 Prohibited Offensive Weapons

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**Introduction**

Article 5 undertakes to deal systematically with attempt, solicitation and conspiracy. These offenses have in common the fact that they deal with conduct that is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do. The offenses are inchoate in this sense.

These, to be sure, are not the only crimes so defined that their commission does not rest on proof of the occurrence of the evil that it is the object of the law to prevent; many specific, substantive offenses also have a large inchoate aspect. This is true not only with respect to crimes of risk creation, such as reckless driving, or specific crimes of preparation, such as possession with unlawful purpose. It is also true, at least in part, of crimes like larceny,<sup>1</sup> forgery, kidnapping and even arson, not to speak of burglary, where a purpose to cause greater harm than that which is implicit in the actor's conduct is an element of the offense. This reservation notwithstanding, attempt, solicitation and conspiracy have such generality of definition and of application as inchoate crimes that it is useful to bring them together in the Code and to confront the common problems they present.

Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction—which the actor by hypothesis ignores—that is threatened for the crime that is his objective. There may be cases where this does occur, as when the actor thinks the chance of apprehension low if he should succeed but high if he should fail in his attempt, or when reflection is promoted at an early stage that otherwise would be postponed until too late, which may be

true in some conspiracies. These are, however, special situations. General deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to these inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses.

Other and major functions of the penal law remain, however, to be served. They may be summarized as follows:

*First:* When a person is seriously dedicated to commission of a crime, a firm legal basis is needed for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime. It is no less important, on the other side, that lines should not be drawn so rigidly that the police confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge.

*Second:* Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but on others. There is a need, therefore, subject again to proper safeguards, for a legal basis upon which the special danger that such individuals present may be assessed and dealt with. They must be made amenable to the corrective process that the law provides.

*Third:* Finally, and quite apart from these considerations of prevention, when the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve inequality of treatment that would shock the common sense of justice. Such a situation is unthinkable in any mature system designed to serve the proper goals of penal law.<sup>2</sup>

These are the main considerations in light of which these provisions have been prepared. Insofar as they have different weight in the three areas involved—attempt, solicitation and conspiracy—the differences are dealt with in the Comments that follow. So too, the other special values that may be unique to one or the other of the offenses—such as the fact that solicitation involves speech and that conspiracy involves group crime—remain to be discussed. The bearing of the inchoate character of these of-

<sup>1</sup> See O. Holmes, *The Common Law* 72 (1881).

<sup>2</sup> See Section 1.02.

fenses on their proper grading for purposes of sentence is also a matter to which attention is later devoted. It should suffice for now, therefore, to summarize the major results of the Model Code provisions. They are:

(a) to extend the criminality of attempts by sweeping aside the defense of impossibility (including the distinction between so-called factual and legal impossibility) and by drawing the line between attempt and noncriminal preparation further away from the final act; the crime becomes essentially one of criminal purpose implemented by an overt act strongly corroborative of such purpose;

(b) to establish criminal solicitation as a general offense;

(c) to limit the unity and scope of criminal conspiracy by emphasizing the primordial element of individual agreement, while preserving, so far as possible, the procedural advantage of joint prosecution of related segments of an organized criminal enterprise;

(d) to eliminate such vague determinants as "oppression," "public morals," and the like, as objectives that may make conspiracy a crime;

(e) to establish in attempt, solicitation and conspiracy a limited defense in cases of renunciation of the criminal objective; and

(f) to establish these inchoate crimes as offenses of comparable magnitude to the completed crimes that are their object.

#### Section 5.01. Criminal Attempt.\*

(1) **Definition of Attempt.** A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with

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\* *History.* Presented to the Institute in Tentative Draft No. 10 and considered at the May 1960 meeting. See ALI Proceedings 130-58 (1960). Subsection (4) was reworded as a result of discussion at that meeting. The entire section was presented again to the Institute with minor verbal changes in the Proposed Official Draft and considered and approved at the May 1962 meeting. See ALI Proceedings 116-18, 226-27 (1962). For original detailed Comment, see T.D. 10 at 26 (1960). See also Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Colum.L.Rev. 571, 573-621 (1961), which in the main consists of the black letter and commentary of the Article 5 sections in Tentative Draft No. 10.

the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

**(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c).** Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

**(3) Conduct Designed to Aid Another in Commission of a Crime.** A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

**(4) Renunciation of Criminal Purpose.** When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and vol-

untary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

#### Explanatory Note

Subsection (1) sets forth the general requirements for an attempt. For analytical clarity, it divides the cases into three types: those where the actor's conduct would constitute the crime if the circumstances were as he believed them to be; those where the actor has completed conduct that he expects to cause a proscribed result; and those where the actor has not yet completed his own conduct, and the problem is to distinguish between acts of preparation and a criminal attempt. In this instance liability depends upon the actor having taken a "substantial step" in a course of conduct planned to culminate in commission of a crime. In all three situations the mens rea is purpose, with two exceptions: with respect to the circumstances under which a crime must be committed, the culpability otherwise required for commission of the crime is also applicable to the attempt; and with respect to offenses where causing a result is an element, a belief that the result will occur without further conduct on the actor's part will suffice. The impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist.

Subsection (2) elaborates on the preparation-attempt problem by indicating what is meant by the concept of "substantial step" contained in Subsection (1)(c). Conduct cannot be held to be a substantial step unless it is strongly corroborative of the actor's criminal purpose. A list of kinds of conduct that corresponds with patterns found in common law cases is also provided, with the requirement that the issue of guilt be submitted to the jury if one or more of them occurs and strongly corroborates the actor's criminal purpose.

Subsection (3) fills what would otherwise be a gap in complicity liability. Section 2.06 covers accomplice liability in situations

where the principal actor actually commits the offense. In cases where the principal actor does not commit an offense, however, it is provided here that the accomplice will be liable if he engaged in conduct that would have established his complicity had the crime been committed.

Subsection (4) develops the defense of renunciation, which can be claimed if the actor abandoned or otherwise prevented the commission of the offense, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The meaning of "complete and voluntary" is elucidated in the second paragraph of the provision. The defense is an affirmative defense, which under Section 1.12 means that the defendant has the burden of raising the issue and the prosecution has the burden of persuasion.

#### Comment<sup>†</sup>

1. *Problem of Definition.* The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor's conduct, measured by objective standards, and how far it should focus on the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, the proper focus of attention is the actor's disposition.<sup>1</sup> The Model Code provisions are accordingly drafted with this in mind.

Needless to say, the law must be concerned with conduct, not with evil thoughts alone.<sup>2</sup> The question to be asked is thus how to delineate the conduct that, when engaged in with a purpose to commit a crime or to advance toward the attainment of a criminal objective, should suffice to constitute a criminal attempt.

In fashioning an answer to this question, one must keep in mind that in attempt, as distinguished from solicitation and conspiracy, disclosure of the criminal design to someone else is not intrinsic to the actor's conduct; nor is there any natural line that is suggested by the situation, like utterance or agreement. The law

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<sup>†</sup> With a few exceptions, research ended Jan. 1, 1979. For the key to abbreviated citations used for enacted and proposed penal codes throughout footnotes, see p. xxxi *supra*.

<sup>1</sup> See Introduction to Article 5.

<sup>2</sup> See Morris, *Punishment for Thoughts*, 49 *Monist* 342 (1965); Dworkin & Blumenfeld, *Punishment for Intentions*, 75 *Mind* 396 (1966). See also *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), especially the discussion at 376.

appearance of his acts. While the actor's behavior is externally equivocal the criminal purpose in his mind is likely to be unfixed—a subjective equivocality. But once the actor must desist or perform acts that he realizes would incriminate him if all external facts were known, in all probability a firmer state of mind exists. Subjective equivocality seems inconsistent with an act that unequivocally demonstrates a criminal purpose. A hunter might buy extra supplies to facilitate an escape in the event he resolves to kill his companion, a question as yet unsettled in his mind. But when he buys poison, which has no reasonable use under the circumstances other than the murder of his companion, the chances are that the debate has been resolved and the actor's purpose is fixed on murder.

The basis for the Institute's rejection of the *res ipsa loquitur* or unequivocality test can best be explained in connection with a consideration of the test proposed by the Code.

6. *Model Penal Code Approach to Preparation Problem.* Subsections (1)(c) and (2) set forth the Code's proposed solution of the problem of framing criteria to determine when the actor has progressed sufficiently toward his criminal objective to have committed an attempt. Subsection (1)(c) provides that the actor must have engaged in conduct that constitutes "a substantial step" in a course of conduct planned to culminate in his commission of the crime. Subsection (2) elaborates what is meant by "a substantial step" in two ways. It provides that conduct shall not be held to be a substantial step unless "it is strongly corroborative of the actor's criminal purpose." It also specifies a number of situations that, without negating the sufficiency of other conduct, should not be held insufficient as a matter of law if they are strongly corroborative of the actor's criminal purpose.

(a) *Requirements of "Substantial Step" and Corroboration of Purpose.* Whether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem. There are, however, several differences to be noted:

First, this formulation shifts the emphasis from what remains to be done, the chief concern of the proximity tests, to what the actor has already done. That further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial. It is expected, in the normal case, that this approach will broaden the scope of attempt liability.

Second, although it is intended that the requirement of a substantial step will result in the imposition of attempt liability

only in those instances in which some firmness of criminal purpose is shown, no finding is required as to whether the actor would probably have desisted prior to completing the crime. Potentially the probable desistance test could reach very early steps toward crime, depending on how one assesses the probabilities of desistance; but since in practice this test follows closely the proximity approaches, rejection of a test of probable desistance will not narrow the scope of attempt liability.

Finally, the requirement of proving a substantial step generally will prove less of a hurdle for the prosecution than the *res ipsa loquitur* approach, which requires that the actor's conduct itself have manifested the criminal purpose. The basic rationale of the requirement that the actor's conduct shall strongly corroborate his purpose to commit a crime is, of course, the same as that underlying the *res ipsa loquitur* view. But framed in terms of corroboration, the present formulation does not so narrowly circumscribe the scope of attempt liability. Rigorously applied, the *res ipsa loquitur* doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose. The courts of New Zealand used to apply the *res ipsa loquitur* test to attempts (either alone or in conjunction with other tests) and one of their decisions can be given as an example.

In *Campbell & Bradley v. Ward*,<sup>128</sup> the court applied the *res ipsa loquitur* doctrine in refusing to find attempted theft in a case in which the court concluded that the conventional proximity rule had been satisfied. Defendants had parked their car while their companion, *M*, unlawfully entered the automobile of another. When the owner of this automobile approached, *M* left and returned to his own car. Defendants then fled but they were later approached and confessed that *M* had entered the other's automobile with the intention of stealing some of its contents pursuant to agreement among all of them. However, nothing in the entered car had been taken or disturbed. Excluding the confessions from consideration, the court found that the defendants' conduct (including that of *M* which had been attributed to them) was too equivocal to support a conviction.

As the *Campbell* case illustrates, and as a distinguished commentator has stressed,<sup>129</sup> an actor's conduct may be incrimi-

<sup>128</sup> [1955] N.Z.L.R. 471 (Sup. Ct.).

<sup>129</sup> See G. Williams, *supra* note 93, at 629-31; Stuart, *The Actus Reus in Attempts*, 1970 Crim.L.Rev. 505, 507-08. Professor Williams explains that when a man appears

nating in a general way without showing beyond a reasonable doubt that the actor had the purpose of committing a particular crime.

Despite their weaknesses, confessions play an important role in the apprehension and conviction of criminals. The *res ipsa loquitur* test unduly restricts their value in an attempt case. The objectives of the *res ipsa loquitur* test will be met if it is required that the actor's conduct, considered in the light of all the circumstances, adds significant evidential force to any proof of criminal purpose based solely on the actor's statements. The actor's conduct would then be "strongly corroborative" of his purpose to commit the crime.

Under the Model Code formulation, the two purposes to be served by the *res ipsa loquitur* test are, to a large extent, treated separately. Firmness of criminal purpose is intended to be shown by requiring a substantial step, while problems of proof are dealt with by the requirement of corroboration—although under the reasoning previously expressed the latter will also tend to establish firmness of purpose.

In addition to assuring firmness of purpose, the requirement of a substantial step will remove very remote preparatory acts from the ambit of attempt liability and the relatively stringent sanctions imposed for attempts. On the other hand, by broadening liability to the extent suggested, apprehension of dangerous persons will be facilitated and law enforcement officials and others will be able to stop the criminal effort at an earlier stage, thereby minimizing the risk of substantive harm, but without providing immunity for the offender.

A number of recent revisions have adopted the substantial step formula, some including the requirement that the actor's conduct strongly corroborate his criminal purpose.<sup>130</sup>

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in an enclosed yard at night wearing a mask, there may be an inference of general criminal purpose but no clear inference as to the actor's particular intent. He also points out that when a match is struck near a haystack, external appearances may be equivocal, but if arson is intended, an attempt should be found. See *Ingram v. Commonwealth*, 192 Va. 794, 66 S.E.2d 846 (1951) (where intent to rape was found under circumstances evidently manifesting an intent to commit any one of several crimes); *People v. Smith*, 71 Ill.App.2d 446, 219 N.E.2d 82 (1966), *cert. denied*, 386 U.S. 910 (1967) (where intent to murder was found under circumstances similarly indicating a general criminal purpose).

<sup>130</sup> One statute and one proposal clearly follow the Model Code in requiring a substantial step corroborative of the actor's intent only in situations covered by Subsection (1)(c). See N.J. § 2C:5-1; Tenn. (p) § 901.

Many codes and proposals contain a requirement of a substantial step corroborative of the actor's intent applicable in situations other than those covered by Subsection

(b) *Specific Enumerations.* Subsection (2) also gives some definite content to the "substantial step" requirement and should reduce contrariety of decision in a number of recurring situations, some of which have been the subject of specific legislation. In an approach not widely followed,<sup>131</sup> the subsection enumerates a number of instances in which attempts may be found if the other requirements of liability are met. If the prosecution can establish that one of the enumerated situations has occurred, the trier of fact must be permitted to determine whether the defendant has taken a substantial step in a course of conduct planned to culminate in his commission of a crime, so long, of course, as his conduct is found to be strongly corroborative of his criminal purpose. This means that if any of the stated circumstances has occurred, a judge has to instruct a jury that it may find a "substantial step" and he must accept its verdict to that effect, unless the judge determines that the conduct is not strongly corroborative of a criminal purpose. What he may not do is determine by himself that the conduct has not advanced far enough to be a "substantial step."

The instances that the Model Code indicates as sufficient for a finding of a substantial step are drawn largely from the de-

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(1)(c); others employ the term "substantial step" without defining it. See note 95 *supra*.

Some recent revisions substantially depart from the Model Code formulation. Under N.Y. § 110.00 the actor is guilty of an attempt if, with appropriate intent, he "engages in conduct which tends to effect the commission of such offense." Mich. (p) S.B. 82 § 1001 requires only "any act towards the commission of such offense." Tex. § 15.01(a) requires "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." Provisions similar to these may be found in Ala. § 13A-4-2; Ariz. § 13-1001; Kan. § 21-3301; La. § 14:27(A); Mont. § 94-4-103(1); Ohio § 2923.02(A); Okla. (1975 p) § 2-101(A); S.C. (p) § 14.1.

Some federal decisions have substantially adopted the Model Code's formulation. See, e.g., *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976); *United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974).

The Law Commission (*supra* note 17, at 18-27) in England has rejected its Working Party's recommendation to employ a "substantial step" approach, in favor of reliance on a test of proximity.

<sup>131</sup> Substantially the same list of factors, to be used for the same purpose, is found in Conn. § 53a-49(b) and Md. (p) § 110.00. The list may also be found in the commentaries to other recent revisions, which suggests that it will provide guidance in those jurisdictions adopting the "substantial step" requirement even where the list was not included in the provision as enacted. See Ark. § 41-701 Commentary at 92; Haw. § 705-500 Commentary at 285; Ore. (p) § 54 Commentary at 51 (enacted as Ore. § 161.405); Brown Comm'n Final Report § 1001; I Brown Comm'n Working Papers 359; Alas. (p) § 11.31.100 Commentary at 73-74 (T.D., Part 2). This list was included in an early proposal in New Jersey, but was deleted from the bill as introduced in and passed by the legislature. Compare New Jersey Penal Code: Final Report of the Criminal Law Revision Commission vol. I: Report and Penal Code § 2C:5-1 (Oct. 1971), with N.J. § 2C:5-1.

cisional law. Often the Code follows antecedent law in permitting a conviction for attempt; in some respects, it allows convictions on the basis of circumstances that courts have considered insufficient. The following discussion relates the position of this subsection to earlier cases and statutes.

(i) *Lying in Wait, Searching, or Following.* In *People v. Rizzo*<sup>132</sup> the actors, armed and planning to rob a payroll carrier, were searching for the contemplated victim when they were apprehended by the police. Convictions for attempted robbery were reversed by the New York Court of Appeals on the ground that the actors had never proceeded beyond the stage of preparation. Directed expressly at the result in *Rizzo*, Louisiana made it an attempt to lie in wait with a dangerous weapon or to search for the contemplated victim.<sup>133</sup>

In cases where murder or robbery were to be consummated by ambush, attempts have been premised on the arrival of the actor at the scene of the proposed ambush,<sup>134</sup> although several courts have refused to find liability when the contemplated victims were not present.<sup>135</sup>

In an English case,<sup>136</sup> two defendants admitted following a truck at night with their own van in order to steal the truck's contents when the driver left or stopped to eat. On one occasion, when the truck got stuck on an icy hill, the defendants, abhorring violence, helped the driver to start the truck moving again. The driver, suspicious of his escort, drove through the night without stopping. Defendants, after following the truck for 130 miles, abandoned their effort. It was held that the defendants' conduct merely amounted to a continuous act of preparation.

Subsection (2)(a) follows the Louisiana statute except that it eliminates the requirement of a dangerous weapon and

<sup>132</sup> 246 N.Y. 334, 158 N.E. 888 (1927).

<sup>133</sup> La. § 14:27(B). For an application of this provision, see *State v. Murff*, 215 La. 40, 39 So.2d 817 (1949); accord, *State v. Wilson*, 218 Ore. 575, 346 P.2d 115 (1959).

<sup>134</sup> See *Stokes v. State*, 92 Miss. 415, 46 So. 627 (1908) (defendant armed); *People v. Gormley*, 222 App.Div. 256, 225 N.Y.S. 653 (1927), *aff'd mem.*, 248 N.Y. 583 (1928) (defendants armed).

<sup>135</sup> *People v. Volpe*, 122 N.Y.S.2d 342 (Kings County 1953) (defendants not armed); *Queen v. Töpken*, 1 Buch.App.Ct. Cases, Cape of Good Hope 471 (1884) (defendants armed); see also *State v. Christensen*, 55 Wash.2d 490, 348 P.2d 408 (1960) (citing *People v. Rizzo*, note 132 *supra*).

<sup>136</sup> *Regina v. Komaroni*, 103 L.J. 97 (Assizes 1953).

encompasses acts of "following." The thought is that acts of following, searching, or lying in wait with criminal purpose manifest, without more, sufficient dangerousness to provide a proper basis for imposing liability.

(ii) *Enticement*. In statutes prohibiting indecent liberties with minors it has sometimes been made an offense to entice or allure minors into buildings or automobiles for the purpose of committing such acts.<sup>137</sup> This basis of liability appears to be susceptible of broader application, since the act of enticement is demonstrative of a relatively firm purpose to commit the crime and clearly indicates the dangerousness of the actor.

The decisional law on this subject is difficult to evaluate because of other diverse factors present in cases where enticement is an element. In statutory rape cases, if the actor had taken indecent liberties with the female<sup>138</sup> or had caused her to expose herself indecently,<sup>139</sup> or if he had indecently exposed his own person,<sup>140</sup> and in any of these instances had the purpose then and there to complete the offense, the actor would be guilty of an attempt to rape or an assault with intent to rape. On the other hand, if the actor merely solicited cooperation in a sexual act, there apparently has been no attempt;<sup>141</sup> and it has been held that a decent laying on of hands for the purpose of detaining the female to listen to further solicitations is not a sufficient overt act.<sup>142</sup> Where

<sup>137</sup> See Tex. § 25.04; Wis. § 944.12.

<sup>138</sup> *Hutto v. State*, 169 Ala. 19, 53 So. 809 (1910); *People v. Johnson*, 131 Cal. 511, 63 P. 842 (1901); *State v. Smith*, 14 Del. (9 Houst.) 588, 33 A. 441 (Ct. Gen. Sess. 1892); *State v. Roby*, 194 Iowa 1032, 1033-45, 188 N.W. 709, 710-15 (1922) (dictum); *State v. Pepka*, 72 S.D. 503, 37 N.W.2d 189 (1949); *Glover v. Commonwealth*, 86 Va. 382, 10 S.E. 420 (1889); *State v. Tomblin*, 124 W.Va. 264, 20 S.E.2d 122 (1942).

<sup>139</sup> *State v. Sherman*, 106 Iowa 684, 77 N.W. 461 (1898); *Granberry v. Commonwealth*, 184 Va. 674, 36 S.E.2d 547 (1946).

<sup>140</sup> *Payne v. Commonwealth*, 33 Ky. 229, 110 S.W. 311 (Ct. App. 1908); *Hays v. People*, 1 Hill 351 (N.Y. 1841); cf. *Anderson v. State*, 75 Ga.App. 643, 44 S.E. 178 (1947) (attempted forcible sodomy where victim beaten); *Rex v. Delip Singh*, 26 B.C. 390 (Ct. App. 1918) (attempted sodomy).

<sup>141</sup> See *State v. Frazier*, 53 Kan. 87, 90, 36 P. 58, 59 (1894) (dictum); *In re Lloyd*, 51 Kan. 501, 502, 33 P. 307, 308 (1893) (dictum); *State v. Sullivan*, 110 Mo.App. 75, 89, 84 S.W. 105, 109 (1904) (dictum).

<sup>142</sup> *Cromeans v. State*, 59 Tex.Crim. 611, 129 S.W. 1129 (1910); see *State v. Roby*, 194 Iowa 1032, 1044, 188 N.W. 709, 714 (1922) (dictum). But a touching that is not indecent may support attempt liability if the actor's purpose is to engage presently in sexual intercourse. See *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922); *People v. Courier*, 79 Mich. 366, 368, 44 N.W. 571, 572 (1890) (dictum). *But cf.* *State v. Moore*,

the actor invited the contemplated victim to proceed to the place intended for the sexual union and offered a reward of some kind, liability has been imposed in some cases<sup>143</sup> and rejected in others.<sup>144</sup>

The concern manifested in one of the cases refusing to find liability—that innocent invitation might be misconstrued<sup>145</sup>—is dealt with in the present subsection by the requirement that the actor's conduct be strongly corroborative of his criminal purpose.

(iii) *Reconnoitering*. Convictions for attempt have generally been sustained when the actor has been apprehended during or after reconnoitering the place contemplated for the commission of the crime. The crimes involved have included murder,<sup>146</sup> larceny,<sup>147</sup> kidnapping<sup>148</sup> and burglary.<sup>149</sup> However, because other factors were present in all of these cases, such as possession of weapons or equipment,<sup>150</sup> confeder-

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194 Ore. 232, 241 P.2d 455 (1952); *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939).

<sup>143</sup> *Rex v. Rump*, 51 Can.Crim.Cas. Ann. 236, [1929] 2 D.L.R. 824 (B.C. Ct. App.) (several attempts to entice); *The King v. Yelds*, [1928] N.Z.L.R. 18 (Ct. App. 1927) (two separate incidents, one involving indecent language and one an attempt to grab the intended victim's arm).

<sup>144</sup> *State v. Harney*, 101 Mo. 470, 14 S.W. 657 (1890); *Mullins v. Commonwealth*, 174 Va. 477, 5 S.E.2d 491 (1939); *The King v. Moore*, [1936] N.Z.L.R. 979 (Ct. App.); *cf. Wooldridge v. United States*, 237 F. 775 (9th Cir. 1916) (meeting arranged but no discussion of enticement); *State v. Moore*, 194 Ore. 232, 241 P.2d 455 (1952) (same).

<sup>145</sup> *See The King v. Moore*, [1936] N.Z.L.R. 979 (Ct. App.).

<sup>146</sup> *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948).

<sup>147</sup> *See State v. Hollingsworth*, 15 Del. (1 Marv.) 528, 41 A. 143 (Ct. Gen. Sess. 1893); *cf. People v. DeGennaro*, 206 Misc. 94, 132 N.Y.S.2d 112 (Kings County Ct. 1954).

<sup>148</sup> *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933).

<sup>149</sup> *People v. Gibson*, 94 Cal.App.2d 468, 210 P.2d 747 (1949); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903) (case treated alternately as one in which actors were approaching scene of intended burglary). *But cf.* the contrary dicta in *Commonwealth v. Eagan*, 190 Pa. 10, 22-23, 42 A. 374, 377 (1899). The last two cases were prosecutions for murder under the felony-murder rule, the underlying felony being attempted burglary.

<sup>150</sup> *See People v. Gibson*, 94 Cal.App.2d 468, 210 P.2d 747 (1949); *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867).

Mention should be made of a group of cases involving firearms in which, despite conduct more advanced than reconnoitering, attempts were not found. These were prosecutions under special statutes punishing attempts "to discharge any kind of loaded arms" or "to shoot" with intent to murder where, by reason of the specification of particular conduct, more proximate behavior was required than in cases of an ordinary

ates,<sup>151</sup> or additional activities,<sup>152</sup> it is difficult to assert unqualifiedly that reconnoitering, without more, was a sufficient overt act to constitute an attempt at common law.

The decisions are also unclear on whether reconnoitering was necessary at common law or whether it was sufficient to prove that the actor had arrived at the place contemplated for the commission of the crime<sup>153</sup> or that he had arrived and had entered unlawfully upon private property.<sup>154</sup> Moreover, when other factors have been present, such as weapons, equipment or confederates,<sup>155</sup> some courts have indi-

attempt to kill. *Mulligan v. People*, 5 Park.Crim.R. 105 (N.Y. Sup. Ct. 1861); *Ex parte Turner*, 3 Okla.Crim. 168, 104 P. 1071 (1909); *Regina v. Grogan*, 15 Vict.L.R. 340 (Austl. 1889); *Regina v. Lewis*, 173 Eng.Rep. 940 (Central Crim. Ct. 1890); *Regina v. St. George*, 173 Eng.Rep. 921 (Assizes 1840). Even under the special statutes there has been a tendency to expand the scope of liability. See *The King v. Linneker*, [1906] 2 K.B. 99 (C.C.R.) (dictum); *The Queen v. Duckworth*, [1892] 2 Q.B. 83 (C.C.R.) (disapproving and overruling *Lewis* and *St. George*, *supra*); *The Queen v. Brown*, 10 Q.B.D. 381, 384-87 (C.C.R. 1883) (dictum).

<sup>151</sup> See *People v. Parrish*, 87 Cal.App.2d 853, 197 P.2d 804 (1948) (complicity was feigned); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933) (one of several was a feigned accomplice); *State v. Hollingsworth*, 15 Del. (1 Marv.) 523, 41 A. 143 (Ct. Gen. Sess. 1893); *People v. Sullivan*, 173 N.Y. 122, 65 N.E. 989 (1903); *People v. Lawton*, 56 Barb. 126 (N.Y. 1867); *People v. De Gennaro*, 206 Misc. 94, 132 N.Y.S.2d 112 (Kings County Ct. 1954). *Contra*, *State v. Christensen*, 55 Wash.2d 490, 348 P.2d 408 (1960) (feigned accomplices).

<sup>152</sup> See *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933); *People v. Collins*, 234 N.Y. 355, 137 N.E. 753 (1922).

<sup>153</sup> See *State v. McCarthy*, 115 Kan. 583, 224 P. 44 (1924) (attempted train burglary found where defendants, with equipment, contacted supposed "inside" accomplice upon arrival at premises). In other cases convictions for attempted robbery were sustained where the accused arrived armed at the chosen location: *People v. Moran*, 18 Cal.App. 209, 122 P. 969 (1912); *People v. DuVeau*, 105 App.Div. 381, 94 N.Y.S. 225 (1905) (confederates feigned); see *People v. Anderson*, 1 Cal.2d 687, 37 P.2d 67 (1934) (underlying felony in a felony-murder case). *Contra*, *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869); cf. *Commonwealth v. Eagan*, 190 Pa. 10, 21-22, 42 A. 374, 377 (1899) (dictum). Arrival at the scene of intended murder does not suffice for an assault with intent to kill. *Burton v. State*, 109 Ga. 134, 34 S.E. 286 (1899).

<sup>154</sup> Attempts were found in *Dooley v. State*, 27 Ala.App. 261, 170 So. 96 (1936) (attempted burglary, accused having sacks in car to carry away intended loot; entry made into fenced-off area); *People v. Davis*, 24 Cal.App.2d 408, 75 P.2d 80 (1938) (attempted burglary); *Commonwealth v. Clark*, 10 Pa. County Ct. 444 (1891) (accused intending burglary and having burglar's tools on person); *Rex v. Page*, [1933] Vict.L.R. 351 (Austl.) (accused intending burglary and having tools, kept watch while confederate climbed on window ledge).

<sup>155</sup> *People v. Stites*, 75 Cal. 570, 17 P. 693 (1888); *People v. Lombard*, 131 Cal.App. 525, 21 P.2d 955 (1933) (reconnoitering also present, but approach characterized as the overt act); *State v. Mazzadra*, 141 Conn. 731, 109 A.2d 873 (1954); see *Stokes v. State*, 92 Miss. 415, 425-26, 46 So. 627, 628-29 (1908) (dictum); *People v. Youngs*, 122 Mich. 292, 300-01, 81 N.W. 114, 117 (1899) (dissenting opinion). *Contra*, *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935); see *People v. Anderson*, 1 Cal.2d 687, 690, 37 P.2d 67, 68 (1934); cf. *Cornwell v. Fraternal Acc. Ass'n*, 6 N.D. 201, 69 N.W. 191 (1896)

cated that it is enough if the actor merely sets out for the place where the crime was to have been committed.<sup>156</sup>

Subsection (2)(c) isolates reconnoitering as one significant overt act that may be found to constitute a substantial step toward the commission of a crime. The rationale for this is that firmness of purpose is shown when the actor proceeds to scout the scene of the contemplated crime in order to detect possible dangers and to fix on the most promising avenue of approach.

(iv) *Unlawful Entry*. Unlawful entry for a criminal purpose has in many instances been punishable under burglary statutes and related laws. Analytically, however, such conduct may also constitute an attempt, and the inclusion here of unlawful entry as a basis for finding a substantial step serves two functions. First, it covers situations not within the technical terms of burglary and related laws. Second, by eliminating the need for using the burglary laws to cover the entire area of attempts by unlawful entry, one of the significant stresses upon the definition of that offense is removed, making possible a more rational law of burglary.<sup>157</sup>

The question of the proper probative relationship between unlawful entry into a building and attempts has arisen in connection with attempted rape. It is clear that, given the requisite purpose, chasing<sup>158</sup> or laying hold<sup>159</sup> of a female constitutes an attempt to rape. In the only case found that

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(proceeding armed toward hunting territory does not constitute an attempt to kill game out of season).

<sup>156</sup> On the other hand, it has been said that merely walking toward a place with intent to commit a murder there does not amount to an attempt to kill. See *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756 (dictum), second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *The Queen v. McCann*, 28 U.C.Q.B. 514 (1869) (by implication); cf. *Rex v. Osborn*, 84 J.P. 63 (Central Crim. Ct. 1919); *Regina v. Roberts*, 7 Cox Crim. Cas. 39, 43, 19 J.P. 789, 790 (Crim. App. 1855) (dictum). Walking toward a person with intent to inflict bodily injury does not constitute an assault. *Brown v. State*, 95 Ga. 481, 20 S.E. 495 (1894) (mem.) (semble).

The court in *Rizzo* took the position that looking for a house to burglarize or for a person to kill does not constitute an attempt, 246 N.Y. 334, 338-39, 158 N.E. 888, 889 (1927) (dictum), and held that looking for a man to rob does not constitute an attempt. There is a dictum that riding to a place with intent there to commit the misdemeanor of carnal abuse of a child does not constitute an attempt. See *Regina v. Meredith*, 173 Eng.Rep. 630, 631 (Assizes 1838).

<sup>157</sup> The problem of multiple convictions for the same conduct is considered in Section 1.08.

<sup>158</sup> *Lewis v. State*, 35 Ala. 380, 388-89 (1860) (dictum); *Burton v. State*, 8 Ala.App. 295, 62 So. 394 (1913); *Williams v. State*, 10 Okla.Crim. 336, 136 P. 599 (1913).

<sup>159</sup> *State v. Montgomery*, 63 Mo. 296, 298-99 (1876) (dictum).

litigated more remote conduct, a man hid under a woman's bed waiting for her to retire, but he was discovered and fled.<sup>160</sup> Although the court refused to find liability, the case is not authority for the proposition that these acts are not sufficient to constitute an attempt to rape. The prosecution was for assault with intent to rape, and the court emphasized lack of the assault element; moreover, it was admitted that the evidence of intent was unsatisfactory. There have been expressions that attempted rape begins when force is applied to the person of the female,<sup>161</sup> and that entering a room with intent to rape its occupant<sup>162</sup> or locking a woman in a room for the purpose of facilitating a rape<sup>163</sup> does not constitute an attempt. These authorities, however, are not conclusive. Where the assault element in attempted rape has received less emphasis—and it must be remembered that originally there was no attempt to rape except assault with intent to rape<sup>164</sup>—then unlawful entry into the room where the rape was to have been committed may well constitute an attempt to rape.

In several attempted larceny cases, convictions were sustained where the actor had unlawfully entered an enclosure for the purpose of stealing.<sup>165</sup> However, these decisions may indicate a willingness to find liability in all instances where a thief arrives at the place where the property is situated with the purpose of taking it away presently. Thus, it has been held that it is an attempt if the actor places his hand in the pocket of another for the purpose of stealing its contents.<sup>166</sup> And in a famous English case it was held that a

<sup>160</sup> *Gaskin v. State*, 105 Ga. 631, 31 S.E. 740 (1898).

<sup>161</sup> See *State v. Swan*, 131 N.J.L. 67, 69, 34 A.2d 734, 735 (Ct. Err. & App. 1943); cf. *State v. Montgomery*, 63 Mo. 296 (1876); *Kelly v. Commonwealth*, 1 Grant 483 (Pa. 1858). But cf. *People v. Welsh*, 7 Cal.2d 209, 60 P.2d 124 (1936) (no assault required for attempted rape).

<sup>162</sup> See *Kelly v. Commonwealth*, 1 Grant 483, 487 (Pa. 1858).

<sup>163</sup> See *Beaudoin v. The King*, 5 Can.Crim.R. 88, 98 (Que. K.B. 1947) (concurring opinion).

<sup>164</sup> See *Rookey v. State*, 70 Conn. 104, 108–09, 38 A. 911, 912 (1897); *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912); *Rex v. MacIntyre*, 43 Can.Crim.Cas. Ann. 356, 358 (N.S. Sup. Ct. 1925).

<sup>165</sup> *State v. Thompson*, 31 Nev. 209, 101 P. 557 (1909); *Rex v. Baker*, 28 N.Z.L.R. 536 (Ct. App. 1909); cf. *Dooley v. State*, 27 Ala.App. 261, 170 So. 96 (1936).

<sup>166</sup> See, e.g., *People v. Fiegelman*, 33 Cal.App.2d 100, 91 P.2d 156 (1939); *People v. Harris*, 70 Ill.App.2d 173, 217 N.E.2d 503 (1966); *People v. Martin*, 62 Ill.App.2d 97, 210 N.E.2d 587 (1965); *People v. Hawkins*, 54 Ill.App.2d 212, 203 N.E.2d 761 (1964).

servant attempted to steal from his master when he deceived a customer as to the quantity delivered in order to retain for himself the difference between the amount actually delivered and the amount credited to his master's account.<sup>167</sup> It was emphasized that all that remained for the servant to do was to carry away the goods standing at his side. But when the actor did not have the purpose of taking the property presently, there was no attempt even though at one time or another he was in the vicinity of the property to be stolen.<sup>168</sup>

In the case of *Campbell & Bradley v. Ward*,<sup>169</sup> a New Zealand court, relying on a *res ipsa loquitur* approach, refused to find an attempt when unlawful entry into an automobile had been made for the purpose of stealing. This conduct was clearly a substantial step manifesting a firm purpose to steal, and, under Subsection (2)(d), the result in *Campbell* would be reversed, allowing the trier of fact in such a case to find that an attempt had been committed.

Apart from burglary provisions, a number of state statutes punish the entry into or on premises with intent to commit certain crimes. Thus, a number of states punish the entry, with or without permission, on the premises of another for the purpose of committing sabotage.<sup>170</sup> One pre-Model Code statute made it attempted robbery to enter, with intent to rob, a room where a person is present.<sup>171</sup> Subsection (2)(d), though applying to all crimes, is in one respect narrower in scope than these provisions, since it does not cover either lawful presence or trespass on unenclosed property, either of which may be wholly insubstantial acts on the facts of a particular case.

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In *Regina v. Taylor*, 25 L.T.R. (n.s.) 75 (Middx. Sess. 1871), it was held that looking into and feeling pockets in order to find property to steal was merely preparation. It was said in *Commonwealth v. Clark*, 10 Pa. County Ct. 444, 447 (1891), that it was no attempt for a pickpocket to follow an intended victim.

<sup>167</sup> *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100 (Crim. App. 1862). In *re Magidson*, 32 Cal.App. 566, 163 P. 689 (1917), was a case where the defendant went to a place where he believed stolen property was stored in order to take possession of it; he was held to have attempted to receive stolen property.

<sup>168</sup> *Lovett v. State*, 19 Tex. 174 (1857); *Rex v. Bloxham*, 29 Crim.App. 37 (1943).

<sup>169</sup> [1955] N.Z.L.R. 471 (Sup. Ct.).

<sup>170</sup> See Fla. § 876.40; La. § 53:202 (also covers producing, assembling, mixing, procuring, transporting, and storing materials to be used in sabotage); Md. art. 27, § 538; N.H. § 649:4; Okla. tit. 21, § 1265.4; Tenn. § 39-4410; Vt. tit. 13, § 3434.

<sup>171</sup> N.D. Cent. Code § 12-31-11 (1960) (repealed 1973).

(v) *Possession of Incriminating Materials.* The general view has been that the collection, possession, or preparation of materials to be employed in the commission of a crime does not go beyond the stage of preparation and does not constitute an attempt. Thus it has been said, by way of dicta, that purchasing a gun or poison with intent to murder,<sup>172</sup> loading the gun<sup>173</sup> or mixing the poison<sup>174</sup> with the same intent, purchasing matches or inflammables with intent to commit arson,<sup>175</sup> constructing a bomb with intent to destroy property,<sup>176</sup> and collecting materials with which to commit burglary<sup>177</sup> all constitute acts of preparation. Few cases have actually turned on issues of this kind. One decision held that it was not an attempt to rob for one to procure

<sup>172</sup> See *United States v. Stephens*, 12 F. 52, 54-55 (C.C.D. Ore. 1882); *People v. Murray*, 14 Cal. 159, 159-60 (1859) (gun); *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *People v. Coleman*, 350 Mich. 268, 276, 86 N.W.2d 281, 285 (1957); *Stokes v. State*, 92 Miss. 415, 425, 46 So. 627, 628 (1908) (gun); *Ex parte Turner*, 3 Okla.Crim. 168, 173, 104 P. 1071, 1074 (1909); *Rex v. Labourdette*, 13 B.C. 443, 444 (Assizes 1908) (poison); *Regina v. Cheeseman*, 9 Cox Crim.Cas. 100, 103 (Crim. App. 1862) (gun).

<sup>173</sup> See *People v. Murray*, 14 Cal. 160, 160 (1859); *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *Stokes v. State*, 92 Miss. 415, 425, 46 So. 627, 628 (1908) (may not be attempt); *Rex v. Labourdette*, 13 B.C. 443, 444 (Assizes 1908). In *People v. Anderson*, 1 Cal.2d 687, 690, 37 P.2d 67, 68 (1934), it was said that concealing a gun on the person preparatory to an endeavor to rob might not constitute an attempt.

<sup>174</sup> See *Rex v. Sharpe*, [1903] Transvaal L.R. 868, 873 (Sup. Ct.). Attempts to murder by poison were found in *Commonwealth v. Kennedy*, 170 Mass. 18, 48 N.E. 770 (1897), and *The King v. White*, [1910] 2 K.B. 124 (Crim. App.). In both, the poison had been placed where the intended victim would partake of it in due course. But in the latter case the court held it was immaterial that slow poisoning might have been intended and that future doses were required to complete the homicide. The court said it was "much more likely . . . that the appellant supposed he had put sufficient poison in the glass to kill her." *Id.* at 130.

Under a charge of assault with intent to kill it is necessary that the victim actually partake of the poison. *Peebles v. State*, 101 Ga. 585, 28 S.E. 920 (1897); *Leary v. State*, 13 Ga.App. 626, 79 S.E. 584 (1913), second opinion, 14 Ga.App. 797, 82 S.E. 471 (1914); see *Johnson v. State*, 92 Ga. 36, 37, 17 S.E. 974, 975 (1893). *But cf.* *State v. Skillings*, 98 N.H. 203, 97 A.2d 202 (1953) (counts of attempted robbery and attempted assault sustained where defendant gave messenger drugged ice cream to remove person guarding the intended loot). This difficulty seems to have arisen only in jurisdictions where it was conventional to prosecute attempted homicides as assaults with intent to kill. See *Johnson v. State*, 92 Ga. 36, 38, 17 S.E. 974, 975 (1893).

<sup>175</sup> See *Groves v. State*, 116 Ga. 516, 517, 42 S.E. 755, 756, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.); *Regina v. Taylor*, 175 Eng.Rep. 831 (Assizes 1859).

<sup>176</sup> See *People v. Stites*, 75 Cal. 570, 575, 17 P. 693, 696 (1888). For a general statement on the nonculpability of procuring materials for crime, see *People v. Werblow*, 241 N.Y. 55, 71, 148 N.E. 786, 793 (1925).

<sup>177</sup> See *Rex v. Osborn*, 84 J.P. 63 (Central Crim. Ct. 1919).

disguises and a hack for such a purpose.<sup>178</sup> Another held that procuring carpet slippers, chloroform, and a gun for use in a burglary did not constitute an attempt.<sup>179</sup> One case held that procuring a key to be used in stealing from a building was an attempt to commit larceny,<sup>180</sup> but this holding has been subsequently disapproved and is no longer authoritative.<sup>181</sup> In view of decisions holding more extreme conduct to be preparation, the general dicta in this area probably indicated accurately what most courts would have held.

In some instances, however, possession of incriminating materials has been held to constitute an attempt. Possession of a still and the necessary mash might be sufficient for an attempt illegally to manufacture intoxicating beverages<sup>182</sup> even though the still is not quite ready for operation and the actors have not yet reached the site.<sup>183</sup> If the still is lacking there can be no such attempt although the use of a still is promised<sup>184</sup> or one is being built.<sup>185</sup> Whether the absence of mash would preclude an attempt is an open question. Similarly, it has been said that obtaining the incriminating apparatus would constitute an attempt to make counterfeit coins<sup>186</sup> or to produce forged documents.<sup>187</sup>

<sup>178</sup> *Groves v. State*, 116 Ga. 516, 42 S.E. 755, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.).

<sup>179</sup> *People v. Youngs*, 122 Mich. 292, 81 N.W. 114 (1899).

<sup>180</sup> *Griffin v. State*, 26 Ga. 493 (1858).

<sup>181</sup> See *Groves v. State*, 116 Ga. 516, 520, 42 S.E. 755, 757, second opinion, 116 Ga. 607, 42 S.E. 1014 (1902) (mem.).

<sup>182</sup> *State v. Thomason*, 23 Okla.Crim. 104, 212 P. 1026 (1923); see *Summerville v. State*, 77 Ga.App. 106, 109, 47 S.E.2d 830, 832 (1948).

<sup>183</sup> *Dill v. State*, 149 Miss. 167, 115 So. 203 (1928); *Anderson v. Commonwealth*, 195 Va. 258, 77 S.E.2d 846 (1953) (defendant was leaving site but intended to return); cf. *United State v. Moses*, 205 F.2d 358, 359 (2d Cir. 1953) (dissenting opinion). But cf. *State v. Quick*, 199 S.C. 256, 19 S.E.2d 101 (1942); *Hartline v. State*, 34 Ga.App. 224, 129 S.E. 123 (1925). In some instances where liability was found, greatest emphasis was placed on the fact that fermentation of the mash was under way.

<sup>184</sup> *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922).

<sup>185</sup> *Coffee v. State*, 39 Ga.App. 664, 148 S.E. 303 (1929).

<sup>186</sup> *Regina v. Roberts*, 7 Cox Crim.Cas. 39, 19 J.P. 789 (Crim. App. 1855).

<sup>187</sup> *Cunningham v. State*, 49 Miss. 685, 702-03 (1874) (dictum). Compare *People v. Coleman*, 350 Mich. 268, 276, 86 N.W.2d 281, 285 (1957) (dictum) (purchase of fountain pen cannot amount to attempted forgery). Two Indian cases seem to stand for the proposition that part of the instrument must be forged before there can be an attempted forgery. *Queen-Empress v. Kalyan Singh*, 16 Indian L.R. Allahabad 409 (App. Crim. 1894); *In re Riasat Ali*, 7 Indian L.R. Calcutta, 352 (App. Crim. 1881).

There have also been a number of statutes that make it a crime to possess materials to be employed in a criminal endeavor.<sup>188</sup> Possession of burglar's tools with intent to commit burglary has been made criminal in many jurisdictions,<sup>189</sup> and it has been provided that possession of materials to be used in an attempt to defraud is *prima facie* evidence of guilt.<sup>190</sup> Some statutes have made the possession of weapons<sup>191</sup> or explosives<sup>192</sup> criminal if a criminal intent can be proved, while in other jurisdictions unlicensed possession of a gun or other weapon has been made *prima facie* evidence of intent in a prosecution for attempt to commit a violent offense.<sup>193</sup> It is necessary to distinguish, however, between proof that an actor possessed weapons or other instruments of crime with some unlawful purpose,<sup>194</sup> and proof that the actor intended to commit a particular crime. If proof of such specific intent is forthcoming, then such statutes might be construed as making possession of a weapon a sufficient overt act. Indeed, the statute in one state has made such possession *prima facie* evidence of "attempt."<sup>195</sup> And, in line with the case law development, one state has provided that assembling the apparatus necessary to manufacture whiskey is an attempt.<sup>196</sup> Finally, statutes in a number of states have punished the collection of materials to be used presently or at a later time in committing "sabotage."<sup>197</sup>

Thus, the authorities existing at the time the Model Code was being drafted—the case law to a slight extent and the statutory trend to a greater degree—showed a tendency to make criminal the possession of materials to be employed in

<sup>188</sup> Not dealt with here are statutes that prohibit the unlicensed possession of specified materials absolutely, without requiring that such possession be for a criminal purpose.

<sup>189</sup> *E.g.*, Cal. § 466; N.Y. § 140.35. Some of the statutes extend to making and repairing burglar's tools, some to making and altering keys for the purpose of burglary, and some to both kinds of preliminary acts.

<sup>190</sup> Fla. § 817.13.

<sup>191</sup> Ore. Rev. Stat. § 161.220 (1969) (repealed 1971).

<sup>192</sup> Ind. Code Ann. § 35-28-4-4 (Burns 1975) (repealed 1977); 1929 Kan. Sess. Laws ch. 171, § 2 (repealed 1969).

<sup>193</sup> Ala. § 13A-11-71; Cal. § 12023; Wash. Rev. Code Ann. § 9.41.030 (West 1977).

<sup>194</sup> This situation is dealt with in Sections 5.06 and 5.07.

<sup>195</sup> Ore. § 166.230(3).

<sup>196</sup> Tenn. § 39-2523.

<sup>197</sup> See note 170 *supra*.

the commission of a crime when the materials were distinctively suited to criminal purposes. The incriminating character of such distinctive materials would usually be apparent to the actor himself, and his possession of them would generally manifest a major commitment to the crime contemplated.

The problem of definition is not easy. If the proposed paragraph were to include only those materials not *susceptible* of lawful use, its coverage might be minimal and perhaps nonexistent, for it is difficult to imagine anything that is not susceptible of *some* lawful use. A still may be used to boil water, counterfeiting plates may be employed as paper weights, and a bomb can be used to remove tree stumps. However, the possession of such articles, under appropriate circumstances, should constitute a basis for finding a substantial step. A definition of incriminating materials, that emphasizes their distinctive qualities without unduly narrowing the scope of the provision, should encompass materials specially designed for unlawful use and those that can serve no lawful purpose of the possessor under the circumstances. Under some circumstances, to be described immediately below, possession of other less distinctively criminal materials may be the basis for finding a substantial step.

(vi) *Materials at or Near the Place of the Crime.* The problem with which Subsection (2)(f) is designed to deal has arisen most frequently in the case of attempted arson. The decisions at common law imposed liability if inflammables were spread about the premises to be burned<sup>198</sup> or if the actor arrived at the premises with inflammables,<sup>199</sup> provided that it was his purpose presently to ignite the inflammables. In the famous decision of *Commonwealth v. Peaslee* it was held that no attempt had occurred although the inflammables had been spread about the premises, because there had been no purpose to ignite them presently, the plan being that either the actor or his agent would return at a later time to complete the crime.<sup>200</sup>

<sup>198</sup> *Commonwealth v. Puretta*, 74 Pa.Super. 463 (1920); *Rex v. Brown*, [1947] 3 Can.Crim.R. 412 (Ont. Ct. App.); see *People v. Graham*, 176 App.Div. 38, 40, 162 N.Y.S. 334, 335 (1916) (dictum).

<sup>199</sup> *State v. Dumas*, 118 Minn. 77, 136 N.W. 311 (1912); *State v. Bliss*, 80 S.W.2d 162 (Mo. 1935); see *Commonwealth v. Mehales*, 284 Mass. 412, 416, 188 N.E. 261, 262 (1933).

<sup>200</sup> 177 Mass. 267, 59 N.E. 55 (1901). The decision in *Commonwealth v. Puretta*, 74 Pa.Super. 463 (1920), may be in conflict with *Peaslee*. The possibility that future

The crime of attempted arson has been the subject of extensive legislation, both in older statutes and in recent revisions. In addition to other provisions, a large number of statutes have made it an attempt<sup>201</sup> to place or distribute<sup>202</sup> explosives, inflammables, combustibles, or devices<sup>203</sup> in a structure subject to arson<sup>204</sup> in an arrangement or preparation<sup>205</sup> with intent eventually to burn<sup>206</sup> the structure or to procure another to burn it.<sup>207</sup> Under some provisions the materials need only be placed near, about, or against the structure.<sup>208</sup> Except for reversing the result in the *Peaslee* case, this legislation is consistent with the common law rule.<sup>209</sup>

Statutes dealing with "sabotage" make the collection of materials, to be used presently or at a later time in committing sabotage, an attempt.<sup>210</sup> Unlike the attempted ar-

ignition has been intended was apparently deemed immaterial in light of the danger created by spreading the inflammables. Defendant was found guilty of an attempt and *Peaslee* was distinguished on the grounds that no danger of conflagration had existed in that case and there had been a voluntary abandonment by the defendant.

<sup>201</sup> See Alas. § 11.20.060; Cal. § 451a; Idaho § 18-804; La. § 14:54; Md. art. 27, § 10; Mass. ch. 266, § 5A; Mich. § 750.77 (offense described as preparation to commit arson); Minn. § 609.57; Miss. § 97-17-9; 1936 N.Y. Laws ch. 895, at 2011-12 (current version at N.Y. §§ 110.00, 150.00 et seq.); S.C. § 16-11-200; Vt. tit. 13, § 509; W. Va. § 61-3-4(b); Wis. § 943.05; Wyo. § 6-7-104(b). For a listing of statutes in effect at the time the Model Code was promulgated, see T.D. 10 at 59 n.179 (1960).

<sup>202</sup> The statutes are cited in note 201 *supra*. "Place" only in Louisiana, Minnesota, New York, Wisconsin. In Michigan: "use, arrange, place, devise or distribute."

<sup>203</sup> The statutes are cited in note 201 *supra*. Louisiana (combustibles or explosive material), Minnesota (combustible or explosive or other destructive material or device), New York (inflammables or one of an enumeration of devices), Wisconsin (combustibles, explosives, or devices).

<sup>204</sup> The statutes are cited in note 201 *supra*. The Minnesota provision encompasses "any property." The New York provision apparently required, as to the placing of inflammables, that the building not be one where such inflammables are commonly stored.

<sup>205</sup> The statutes are cited in note 201 *supra*. "In an arrangement or preparation" is omitted in Louisiana, Michigan, Minnesota, New York, Wisconsin.

<sup>206</sup> The statutes are cited in note 201 *supra*. The Minnesota provision requires "intent to set fire to or blow up or otherwise damage such property."

<sup>207</sup> The statutes are cited in note 201 *supra*. Language pertaining to the procuring or inducing of another to burn (or similar language) is omitted in Louisiana, Minnesota, and Wisconsin.

<sup>208</sup> The statutes are cited in note 201 *supra*. California (in or about), Louisiana (in or near), Massachusetts (in or against), Michigan (in or about), Minnesota (in or near), New York (as to inflammables—in or about; as to devices—no indication of location), Wisconsin (in or near).

<sup>209</sup> See *Commonwealth v. Mehales*, 284 Mass. 412, 188 N.E. 261 (1933) (applying a specific provision on attempted arson).

<sup>210</sup> See note 170 *supra*.

son provisions they do not require that the materials be collected at or near the affected premises.

Numerous enacted and proposed revised codes make it a crime to convey various articles into prison with intent to aid an escape.<sup>211</sup> Others prohibit knowingly conveying into prison materials that in fact are contraband there, without requiring intent to aid an escape.<sup>212</sup> An early case held that there was no attempt to free a prisoner where the actor had smuggled tools into the jail for that purpose.<sup>213</sup>

Other decisions at common law that concerned the bringing of materials, such as weapons or equipment, to the scene of the contemplated crime involved reconnoitering as well and have been discussed in that connection. Attempts were found in some such cases and also in some cases in which the actor was merely approaching the scene of the contemplated crime. The question with which the Model Code had to deal was whether, absent reconnoitering, there can be an attempt when the actor arrives at the scene of the contemplated crime with materials to be used in its commission. If the would-be murderer, when he arrives at the place contemplated for the commission of the crime, has a gun, or the would-be burglar a ladder, should this be a sufficient basis for holding that the actor has taken a substantial step? What of the would-be forger who brings a pen to the bank?

The purpose of these subsections is to define circumstances that show a relatively firm commitment by the actor to commit a crime. The possession, collection, or fabrication of materials shows such a commitment under certain circumstances, the two significant variables being: (1) the nature of the materials—their distinctiveness as an instru-

<sup>211</sup> See Conn. § 53a-174(a); Iowa § 719.6; Kan. § 21-3811; Me. tit. 17-A, § 756; Minn. § 609.485(subd.2)(2); Mo. § 575.230(1); N.M. § 40A-22-12; Tex. § 38.10; Va. § 18.2-473; Wis. § 946.44(1)(b); Cal. (p) S.B. 27 §§ 15505, 15506; Mich. (p) S.B. 82 §§ 4610, 4611; Okla. (1975 p) § 2-612(3); Tenn. (p) § 2310; Vt. (p) § 2.26.6. For a listing of statutes in effect at the time the Model Code was promulgated, see MPC T.D. 10 at 60 n.188 (1960).

<sup>212</sup> See Ala. §§ 13A-10-36 to -10-38; Ariz. § 13-2505; Del. tit. 11, § 1256; Haw. §§ 710-1022, -1023; Ky. §§ 520.050, .060; Mont. § 94-7-307; Neb. § 28-913; N.H. § 642:7; N.J. § 2C:29-6; N.Y. §§ 205.20, .25; N.D. § 12.1-08-09; Ore. § 162.185; Wash. §§ 9A.76.140 to .76.160; U.S. (p) S. 1437 § 1314 (Jan. 1978); Brown Comm'n Final Report § 1309; Alas. (p) § 11.56.380 (H.B. 661, Jan. 1978); Md. (p) §§ 205.30, .35; S.C. (p) § 20.12(1); W. Va. (p) §§ 61-9-24, -9-25. Two revised codes and three proposals contain such a provision in addition to the provisions cited in note 211 *supra*. See Conn. § 53a-174(b); Wis. § 946.44(1)(c); Cal. (p) S.B. 27 § 15505; Mich. (p) S.B. 82 §§ 4615, 4616; Vt. (p) § 2.26.7.

<sup>213</sup> Patrick v. People, 132 Ill. 529, 24 N.E. 619 (1890).

mentality of the contemplated crime; and (2) the location of the materials—whether they have been brought to the scene of the contemplated crime or have merely been acquired. The principal situations are those in which:

(1) The materials are so plainly instrumentalities of crime that mere possession of them is a sufficient basis for finding a substantial step toward the crime. This situation is covered by Subsection (2)(e).

(2) The materials serve a lawful purpose of the actor under the circumstances, so that no substantial step should be found in the ordinary case even if the materials are taken to the scene of the crime. The would-be forger who takes his pen to the bank usually will not have taken a substantial step, since little resolution is required merely to carry a pen, which is an ordinary accessory and generally would serve a lawful purpose of the actor.

(3) The materials fall between the two previous classes. Here a finding that a substantial step has been taken should be permissible if the actor has arrived at the scene of the contemplated crime with materials in his possession that under the circumstances serve no lawful purpose of the actor. This would encompass, in the usual case, a would-be murderer carrying a lethal weapon or an intended burglar in possession of a ladder. The substantiality of the step taken in this situation is demonstrated by the nature of the materials and the proximity to the scene of the contemplated crime, which *in combination* show a firm criminal purpose. Thus, this situation is covered explicitly in Subsection (2)(f).

(vii) *Solicitation of Innocent Agent*. Professor Glanville Williams suggests the situation where “D unlawfully tells E to set fire to a haystack, and gives him a match to do it with. . . . If, as D knows, E (mistakenly) believes that it is D’s stack and that the act is lawful, E is an innocent agent, and D is guilty of attempted arson; D, in instructing E, does the last thing that he intends in order to effect his criminal purpose. (It would be the same if he only used words and did not give E a match.)”<sup>214</sup>

The prohibition against criminal solicitation does not apply in this case because *E* is himself not being incited to commit

<sup>214</sup> G. Williams, *supra* note 93, at 616. See *State v. Skillings*, 98 N.H. 203, 97 A.2d 202 (1953) (messenger given drugged ice cream to deliver to intended victim; attempts to assault and to rob sustained).

a crime.<sup>215</sup> For this reason *E* is not in a position, as an independent moral agent, to resist *D*'s inducements; unlike the situation in criminal solicitation, *E* is wholly unaware that commission of a crime is involved. Analytically, therefore, *D*'s conduct, in soliciting an innocent agent, is conduct constituting an element of the crime, which is properly subsumed under the attempt section; and the solicitation, irrespective of whether it happens to be the last act, should be the basis for finding a substantial step toward the commission of a crime.

(viii) *Other Patterns of Preparation and Attempt.* Subsection (2) also provides that the specific list of factors that has just been discussed does not preclude the possibility of finding an attempt in other contexts. Listed below are other situations that research has disclosed have given rise to preparation-attempt problems in the past and that can adequately be handled in future litigation by the formulations in Subsections (1)(c) and (2).

In crimes such as bribery, extortion and obtaining money by false pretenses, in which communication of a culpable message is an essential element of the offense, an attempt has generally been found when the actor's conduct is such that he believes it sufficient to convey all or part of that message to the intended victim.

Attempted extortion cases are few, but they seem to support this proposition. When the victim had been threatened, attempts were found;<sup>216</sup> when the actor had not made contact with his intended victim, his actions were construed as preparation.<sup>217</sup>

The pattern in cases of attempted bribery and of attempted corruption of jurors is more complicated. In the

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<sup>215</sup> In *Rex v. Silburn*, 24 Natal L.Rep. 527, 530 (Durban Cir. Ct. 1903), it was said that for there to be an indictable solicitation the person solicited must be aware that the conduct requested is a crime. See also 1 W. Russell, *supra* note 55, at 187.

<sup>216</sup> *People v. Fratianno*, 132 Cal.App.2d 610, 282 P.2d 1002 (1955); *People v. Franquelin*, 109 Cal.App.2d 777, 241 P.2d 651 (1952); *Commonwealth v. Neubauer*, 142 Pa.Super. 528, 16 A.2d 450 (1940); cf. *United States v. Baker*, 129 F.Supp. 684 (S.D. Cal. 1955). But see *Rex v. Landow*, 109 L.T.R. (n.s.) 48 (Crim. App. 1913) (attempt by threats to procure a person to leave the country to become an inmate of a brothel). In the *Franquelin* and *Neubauer* cases the actor had done more than communicate his threats; these further acts were emphasized in the opinions.

In *Martin v. Commonwealth*, 195 Va. 1107, 81 S.E.2d 574 (1954), exhibiting a nude woman to male prospects and soliciting money to cohabit with her were held to constitute attempted pandering.

<sup>217</sup> *State v. Lampe*, 131 Minn. 65, 154 N.W. 737 (1915).

typical case the actor has taken all the steps he deems necessary to convey his offer but has sought to operate through an intermediary. The cases have been split on whether the presence of this "independent" third party precludes an attempt.<sup>218</sup> Cases imposing liability in this situation rely upon apparently effective communication. Those refusing to find an attempt have been based on the actor's inability to commit the crime without the assistance of the third party, as discussed previously. Cases are few in which the actor does not consider his conduct sufficient to convey his bribe offer, and these have divided on whether there is an attempt to bribe.<sup>219</sup>

When the crime attempted is obtaining money by false pretenses, more extensive litigation has permitted answers that are less inconclusive. The common law requirement of communication is best illustrated by the leading English case, *The King v. Robinson*.<sup>220</sup> The actor-jeweler, planning to defraud the insurance company on his policy of theft insurance, hid his jewelry, bound himself, and called for assistance; the police released him and he represented to them that his jewelry had been stolen. But the actor's plot was discovered by the police before the actor could communicate with the insurance company. The court held that there was no attempt, but stated that if the actor had notified the insurance company of the "theft" or had filed a claim with them he would have been guilty. This approach has been followed and attempts found in a number of situations: (1) where the misrepresentation was complete and constituted the last act;<sup>221</sup> (2) where the misrepresentation was complete in the

<sup>218</sup> *Attempt liability sustained*: *Summers v. State ex rel. Boykin*, 66 Ga.App. 648, 19 S.E.2d 28 (1942) (contempt); *Brewer v. State*, 176 Miss. 803, 170 So. 540 (1936) (contempt); *cf.* *People v. Coleman*, 350 Mich. 268, 86 N.W.2d 281 (1957) (attempt to obstruct justice based on intercepted threat to be conveyed by intermediary).

*Attempt liability rejected*: *United States v. Carroll*, 147 F. 947 (D. Mont. 1906) (contempt); *State v. Lowrie*, 237 Minn. 240, 54 N.W.2d 265 (1952) (attempt to bribe); *In re Ellison*, 256 Mo. 378, 165 S.W. 987 (1914) (contempt); *see* *State v. Brown*, 95 N.C. 685, 687 (1886).

<sup>219</sup> *Compare* *State v. Brown*, 95 N.C. 685 (1886) (no attempt liability), *with* *Summers v. State ex rel. Boykin*, 66 Ga.App. 648, 19 S.E.2d 28 (1942) (attempt liability sustained).

<sup>220</sup> [1915] 2 K.B. 342 (Crim. App.); *accord*, *People v. Rappaport*, 207 Misc. 604, 142 N.Y.S.2d 125 (Bronx County Ct. 1955).

<sup>221</sup> *Lemke v. United States*, 211 F.2d 73 (9th Cir.), *cert. denied*, 347 U.S. 1013 (1954); *People v. Wallace*, 78 Cal.App.2d 726, 178 P.2d 771 (1947); *Regina v. Eagleton*, 6 Cox Crim.Cas. 559 (Crim. App. 1855); *Regina v. Hensler*, 22 L.T.R. (n.s.) 691 (C.C.R. 1870); *Regina v. Rigby*, 7 Cox Crim.Cas 507 (Assizes 1858).

sense that no new misrepresentations needed to be made but further acts were required;<sup>222</sup> (3) where the misrepresentation was complete and further misrepresentations were required to complete the crime.<sup>223</sup> In some such situations liability has not been found, but the results in these cases are attributable in large part to unduly strict versions of general attempt theory,<sup>224</sup> and included instances in which the court erroneously affirmed the necessity of the last act.<sup>225</sup> On the other hand, when no misrepresentations have been made, it is clear that there has been no attempt,<sup>226</sup> even if contact has been made with the contemplated victim through inquiries by the actor.<sup>227</sup>

Actual communication with the victim has not been required; all that is needed is conduct that the actor believes is sufficient to convey the misrepresentation. Thus if a misrepresentation were to be sent by mail, the attempt would be complete as soon as the letter was posted.<sup>228</sup> And when a workman's wages were to be computed on the basis of output as represented by tally cards delivered to a bookkeeper, an attempt was found where the worker inserted extra tally

<sup>222</sup> *People v. Von Hecht*, 133 Cal.App.2d 25, 283 P.2d 764 (1955); *Norris v. State*, 40 Ga.App. 232, 149 S.E. 158 (1929); *Parker v. State*, 29 Ga.App. 26, 113 S.E. 218 (1922); *Williams v. State*, 209 Miss. 902, 48 So.2d 598 (1950); *The Queen v. Button*, [1900] 2 Q.B. 597 (C.C.R.); *accord*, *Rex v. Wing*, 22 Can.Crim.Cas. Ann. 426 (Ont. App. Div. 1913).

<sup>223</sup> *People v. Mann*, 113 Cal. 76, 45 P. 182 (1896); *People v. Paluma*, 18 Cal.App. 131, 122 P. 431 (1912); *Rex v. Laitwood*, 4 Crim.App.R. 248 (1910); *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893), *cf.* *H.M. Advocate v. Camerons*, 48 Scot.L.R. 804 (1911) (under such circumstances it is a jury question whether there is an attempt).

<sup>224</sup> *People v. Werner*, 16 Cal.2d 216, 105 P.2d 927 (1940); *State v. Block*, 333 Mo. 127, 62 S.W.2d 428 (1933). In both cases the court narrowed the scope of attempt liability on a number of issues. *See also* *Commonwealth v. Kelley*, 162 Pa.Super. 526, 58 A.2d 375 (1948), where the court refused to find liability because the actor's intentions after the initial misrepresentation were a matter of "pure conjecture."

<sup>225</sup> *Rex v. Punch*, 20 Crim.App.R. 18 (1927); *Queen-Empress v. Dhundi*, 8 Indian L.R. Allahabad 304 (Crim. Rev. 1886).

<sup>226</sup> *People v. Werblow*, 241 N.Y. 55, 148 N.E. 786 (1925).

<sup>227</sup> *In re MacCrea*, 15 Indian L.R. Allahabad 173 (App. Crim. 1893).

<sup>228</sup> *See* *People v. Werblow*, 241 N.Y. 55, 64-65, 148 N.E. 786, 790 (1925); *Rex v. Waugh*, [1909] Vict. L.R. 379, 382 (Austl.); *Regina v. Hensler*, 22 L.T.R. (n.s.) 691 (C.C.R. 1870); *cf.* *People v. National Radio Distrib. Corp.*, 9 Misc.2d 824, 168 N.Y.S.2d 886 (Bronx County Ct. 1957) (misbranded tubes delivered to post office but not forwarded). *But cf.* *State v. Pollard*, 215 La. 655, 41 So.2d 465 (1949) (acts within county did not proceed beyond preparation when false estimate was mailed from county but received outside county).

cards into the record-keeping system at the point most remote from the bookkeeper;<sup>229</sup> no further acts on his part were required to convey the misrepresentation to the bookkeeper. Furthermore, the objective of the misrepresentation need not be the valuable itself, but may be the means of obtaining the valuable. Thus if the actor seeks to obtain a check or credit by his misrepresentation, he has committed an attempt.<sup>230</sup>

The regulation of the liquor trade in the United States has involved, in varying combinations, prohibitions against manufacturing, transporting, selling, or importing illegal liquor. It has been held that transporting liquor is not an attempt to sell<sup>231</sup> and that waiting for liquor to be loaded in an automobile is neither an attempt to sell nor an attempt to transport.<sup>232</sup> As to attempts to import, the few available cases have established that approaching the prescribed territory with the liquor is an attempt<sup>233</sup> while ordering or purchasing the illegal alcohol is just preparation.<sup>234</sup>

<sup>229</sup> Regina v. Rigby, 7 Cox Crim.Cas. 507 (Assizes 1858).

<sup>230</sup> Parker v. State, 29 Ga.App. 26, 113 S.E. 218 (1922); Rex v. Parkes, 4 Can.Crim.R. 382 (B.C. Ct. App. 1947); Regina v. Eagleton, 6 Cox Crim.Cas. 559 (Crim. App. 1855). *But cf.* Queen-Empress v. Dhundi, 8 Indian L.R. Allahabad 304 (Crim. Rev. 1886).

<sup>231</sup> Moss v. State, 6 Ga.App. 524, 65 S.E. 300 (1909).

In Hope v. Brown, [1954] 1 All E.R. 330 (Q.B. Div.), the charge was an attempt to sell meat at prices in excess of those fixed by law. Defendant had prepared the excessive price labels for 21 packages and had instructed an assistant to put the labels on the packages before the meat was delivered the following day. *Held*, until the labels were affixed to the packages there was no attempt. There is dicta in accord in Gardner v. Akeroyd, [1952] 2 Q.B. 743.

<sup>232</sup> Andrews v. Commonwealth, 135 Va. 451, 115 S.E. 558 (1923).

<sup>233</sup> Gregg v. United States, 113 F.2d 687, *rev'd on other grounds on rehearing*, 116 F.2d 609 (8th Cir. 1940).

<sup>234</sup> United States v. Stephens, 12 F. 52 (C.C.D. Ore. 1882). *Compare* United States v. Robles, 185 F.Supp. 82 (N.D. Cal. 1960) (letter soliciting information from Mexican narcotics producer held to be an attempt to unlawfully possess narcotics in the United States).

Cases concerned with the illegal manufacture of intoxicating beverages have already been discussed.

In Commonwealth v. Underkoffler, 32 Pa.D. & C. 183 (Q.S. Bucks County 1938), a conviction of an attempt to operate a motor vehicle while under the influence of liquor was sustained, the court holding that getting behind the wheel with the necessary intent was a sufficient overt act, and that it was unnecessary to begin to start the motor in order to constitute the offense. An indictment charging a similar offense was sustained in State v. Jones, 125 Me. 42, 130 A. 737 (1925), where the defendant was alleged to have turned the key and operated the self-starter. For a contrary holding, see State v. Parker, 123 Vt. 369, 189 A.2d 540 (1963).

Where the charge involves an attempt to marry illegally, it has been held that the parties must be standing before the magistrate ready to begin the ceremony.<sup>235</sup>

Attempts to commit abortion have been found when all was in readiness for the operation to commence,<sup>236</sup> and when parties had progressed no further than the sterilization or rinsing of instruments by the doctor.<sup>237</sup> However, making arrangements and obtaining payment for the abortion have been held insufficient, even when hospital records have been prepared and the woman was in the waiting room,<sup>238</sup> and when the woman, cooperating with police, had entered the room where the operation was to be performed and, having been told to undress, was waiting for the doctor to collect his instruments.<sup>239</sup>

The only nonsolicitation case found involving attempted adultery sustained the charge where the parties were discovered in a bedroom in the process of disrobing.<sup>240</sup>

It has been held that there is an attempt to free a prisoner if two of the three jail doors are opened<sup>241</sup> but that there is no attempt to free a prisoner if the actor merely smuggles tools into the jail for that purpose.<sup>242</sup> It has also been held

<sup>235</sup> *People v. Murray*, 14 Cal. 159 (1859); *The Queen v. Peterson*, 1 Indian L.R. Allahabad 316 (Crim. Rev. 1876); *cf. People v. MacDonald*, 24 Cal.App.2d 702, 76 P.2d 121 (1938).

<sup>236</sup> *People v. Root*, 246 Cal.App.2d 600, 55 Cal.Rptr. 89 (1966) (defendant had placed his hands upon the woman); *People v. Bowby*, 135 Cal.App.2d 519, 287 P.2d 547 (1955); *People v. Raffington*, 98 Cal.App.2d 455, 220 P.2d 967 (1950), *cert. denied*, 340 U.S. 912 (1951); *Adams v. State*, 81 Nev. 524, 407 P.2d 169 (1965) (force had been applied to the woman so that the operation might commence); *People v. Conrad*, 102 App.Div. 566, 92 N.Y.S. 606, *aff'd mem.*, 182 N.Y. 529, 74 N.E. 1122 (1905); *cf. People v. Woods*, 24 Ill.2d 154, 180 N.E.2d 475 (1962) (finding attempt liability where the woman had not yet undressed to permit the preliminary examination).

<sup>237</sup> *People v. Berger*, 131 Cal.App.2d 127, 280 P.2d 136 (1955); *People v. Reed*, 128 Cal.App.2d 499, 275 P.2d 633 (1954).

<sup>238</sup> *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29 (1953); *People v. MacEwing*, 216 Cal.App.2d 33, 30 Cal.Rptr. 476 (1963).

<sup>239</sup> *Commonwealth v. Willard*, 179 Pa.Super. 368, 116 A.2d 751 (1955) (specific attempted abortion statute held exclusive). *See also People v. Buffum*, 40 Cal.2d 709, 256 P.2d 317 (1953) (no attempt when arrangements made for abortion and women transported outside the state for the purpose); *Dupuy v. State*, 204 Tenn. 624, 325 S.W.2d 238 (1959) (no attempt when doctor and instruments were in readiness but woman had not disrobed).

<sup>240</sup> *State v. Schwarzbach*, 84 N.J.L. 268, 86 A. 423 (Ct. Err. & App. 1913).

<sup>241</sup> *State v. Carivey*, 190 N.C. 319, 129 S.E. 802 (1925).

<sup>242</sup> *Patrick v. People*, 132 Ill. 529, 24 N.E. 619 (1890).

that there is no attempt to escape if a prisoner procures tools to be used in a later effort,<sup>243</sup> or if a prisoner conceals himself with intent to escape but in a place affording little opportunity of success.<sup>244</sup> In addition, there are a significant number of statutes dealing with the problem of the conveying of things into jail for the purpose of aiding an escape.<sup>245</sup>

(c) *Functions of Judge and Jury.* The distinction between preparation and attempt was accomplished in the past largely by judicial opinions, supplemented by various special statutes. Juries also participated in the process to some extent, since, prior to the judicial inquiry, there may have been a jury verdict of guilty pursuant to a charge requiring a finding that the defendant's conduct amounted to a "commencement of the consummation" or that his conduct complied with one of the other very generalized formulas for determining whether conduct has gone far enough to constitute an attempt.

A similar involvement arises under Subsections (1)(c) and (2), since presumably the charge to the jury will require a finding that defendant's conduct amounted to a "substantial step in a course of conduct planned to culminate in his commission of the crime" and that the conduct "is strongly corroborative of the actor's criminal purpose." While these statements, standing alone, may not be particularly enlightening to a jury, the jurors' participation can be made meaningful if it is impressed upon them that defendant's conduct must be important or significant in two senses: (1) in advancing the criminal purpose charged, and (2) in providing some verification of the existence of that purpose.

One important innovation of the Model Code is that, on the first of these issues, which is concerned with the presence of a "substantial step," a judge's authority to set aside a jury verdict of guilty is limited if the case comes within one of the situations specifically enumerated in Subsection (2). In such a case the judge can refuse to submit the issue to the jury or refuse to accept the decision of the jury only if there is insufficient evidence of criminal purpose or there is no reasonable basis for holding that the defendant's conduct was "strongly corroborative" of the criminal purpose attributed to him.

<sup>243</sup> State v. Hurley, 79 Vt. 28, 64 A. 78 (1906).

<sup>244</sup> Rex v. Labourdette, 13 B.C. 443 (Assizes 1908).

<sup>245</sup> See *supra* notes 211 & 212 and accompanying text.

(d). *Criminality of Preparation.* Several English statutes have made criminal not only attempts, but also any act "preparatory" to the commission of the substantive offenses defined in such statutes.<sup>246</sup> A provision of the English defense regulations at one time contained similar language.<sup>247</sup> In a decision construing the latter provision, one of the justices stated that the words of the act were "intended to apply to what the law would regard as something less than an attempt" and that in proscribing "preparatory" acts the regulation might reach "acts which are only remotely connected with the commission of an offense."<sup>248</sup> The provision was criticized as "extending criminal liability beyond what exists in regard to other crimes." Thereafter, the defense regulations were amended to delete the language punishing "preparatory" acts.<sup>249</sup>

Similar provisions were involved in pre-Model Code statutes punishing attempted arson, many of which are still applicable. In addition to expressly proscribing the placing or distributing of inflammables about the premises to be burned, these statutes often have made criminal any act preliminary to or in furtherance of an attempt<sup>250</sup> or a solicitation to commit arson.<sup>251</sup> One state has enacted a statute providing that preparation to commit arson shall constitute an attempt,<sup>252</sup> and one state, prior to enacting its revised code, made punishable any act done "willfully and maliciously" that could or might result in setting afire a structure subject to arson.<sup>253</sup>

There have been other, scattered provisions to the same effect. These have punished any act preparatory to the man-

<sup>246</sup> Dangerous Drugs Act, 14 § 15 Geo. 6, ch. 48, § 15(1)(d), at 318 (1951) (repealed 1965) (not coupled with proscription of attempt); Salmon and Freshwater Fisheries (Protection) (Scotland) Act, 14 § 15 Geo. 6, ch. 26, § 8, at 61 (1951); Official Secrets Act, 10 & 11 Geo. 5, ch. 75, § 7, at 497 (1920).

<sup>247</sup> Regulation 90(1) of the Defense (General) Regulations (1939).

<sup>248</sup> Gardner v. Akeroyd, [1952] 2 Q.B. 743, 750, 2 All E.R. 306, 311.

<sup>249</sup> [1952] 3 Statutory Instruments 3007 (No. 2091(14)).

<sup>250</sup> Alas. § 11.20.050; Cal. § 451a; Idaho § 18-804(b); Md. art. 27, § 10; Mass. ch. 266, § 5A; Miss. § 97-17-9; Nev. § 205.025(2); S.C. § 16-11-200; Tenn. § 39-503; Vt. tit. 13, § 505; W. Va. § 61-3-4(a); Wyo. § 6-7-104(b). See also Pa. tit. 18, § 4310. For a listing of statutes in effect at the time the Model Code was promulgated, see MPC T.D. 10 at 67 n.233 (1960).

<sup>251</sup> The Massachusetts provision, cited in note 250 *supra*, is not clear on whether an act preliminary to a solicitation would suffice.

<sup>252</sup> Nev. § 205.055.

<sup>253</sup> Ind. Code Ann. § 35-16-1-6 (Burns 1975) (repealed 1977).

ufacture of illegal liquor,<sup>254</sup> and any act done with intent to assist a prisoner to escape.<sup>255</sup>

These provisions are examples of legislative efforts to correct the narrow circumscribing of attempt liability and, in effect, eliminate the distinction between preparation and attempt. When the preparation-attempt distinction is made with a view toward imposing liability in a broader class of cases where dangerousness of character is plainly manifested, the need for handling some of these cases by imposing liability for preparation is eliminated and the incidence of such enactments should be reduced. In at least some states adopting the Model Code formulation, this development seems to have taken place.<sup>256</sup>

7. *Attempting to Aid.* It was clear when the Model Code provision was being drafted that one who aided and abetted,<sup>257</sup> solicited<sup>258</sup> or conspired with<sup>259</sup> another to commit an offense was liable for any attempt made by the latter. But there was little litigation concerning liability for conduct designed to aid another to commit a crime when the crime was not committed or attempted by the other person. Subsection (3) would make such action a criminal attempt.

Two cases, on their facts, involved attempted aiding and abetting. In one<sup>260</sup> a policeman, desiring to assist an illegal gambling establishment, telephoned the proprietors that the police were closing in. The police, however, were already in possession of the premises and one of the officers answered the phone. The

<sup>254</sup> Tenn. § 39-2523.

<sup>255</sup> See, e.g., Ala. §§ 13A-10-34, -10-35.

<sup>256</sup> For example, before the revision of the penal codes in Arkansas, Connecticut, Delaware, Kentucky, Nebraska, and North Dakota, there were statutes in those states making criminal any act preliminary to or in furtherance of an attempt to commit arson. 1929 Ark. Acts § 4, No. 38 (repealed 1976); Conn. Gen. Stat. § 53-85 (1958) (repealed 1971); Del. Code Ann. tit. 11, § 358(a) (1953) (repealed 1973); Ky. Rev. Stat. § 433.040(1) (1970) (repealed 1975); Neb. Rev. Stat. § 28-504.04 (1956) (repealed 1978); N.D. Rev. Code § 12-3406 (1943) (repealed 1973). These provisions were repealed when the Model Code's substantial step formula was adopted together with the requirement that the actor's conduct strongly corroborate his criminal purpose. See Ark. § 41-701(3); Conn. § 53a-49(b); Del. tit. 11, § 532 ("substantial step" is "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime"); Ky. § 506.010(2) (same as Delaware); Neb. § 28-201; N.D. § 12.1-06-01(1).

<sup>257</sup> *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296 (1946); *Regina v. Esmonde*, 26 U.C.Q.B. 152 (1866).

<sup>258</sup> *The Queen v. Goodman*, 22 U.C.C.P. 338 (1872).

<sup>259</sup> *People v. Benenato*, 77 Cal.App.2d 350, 175 P.2d 296 (1946); *State v. Wilson*, 30 Conn. 500 (1862).

<sup>260</sup> *Commonwealth v. Haines*, 147 Pa.Super. 165, 24 A.2d 85 (1942).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
MARTIE SODERBERG,  
  
Appellant,

NO. 36132-2-III

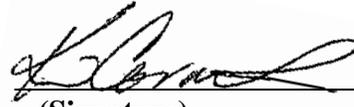
CERTIFICATE OF  
SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on May 7, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement:

Robert Seines  
rseines@msn.com

5/7/2019  
(Date)

Spokane, WA  
(Place)

  
(Signature)

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