## 580 ATTEMPT — § 939.32

The defendant is charged with attempted (name intended crime) .

### Statutory Definition of the Crime

The crime of attempted (name intended crime) , as defined in § 939.32 and § ____[1] of the Criminal Code of Wisconsin, is committed by one who, with intent to commit (name intended crime) , does acts toward the commission of that crime which demonstrate unequivocally, under all of the circumstances, that he or she had formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

### State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements[2] were present.

### Elements of the Crime That the State Must Prove

1. The first element of attempted (name intended crime) requires that the defendant intended[3] to commit the crime of (name intended crime) .

The crime of (name intended crime) is committed by one who

LIST THE ELEMENTS OF THE INTENDED CRIME AS IDENTIFIED IN THE UNIFORM INSTRUCTION. ADD DEFINITIONS FROM THE UNIFORM INSTRUCTIONS AS NECESSARY.[4]

 

The crime charged against the defendant in this case, however, is not (name intended crime) as defined but an attempt to commit the crime of (name intended crime) .

2. The second element of attempted (name intended crime) requires that the defendant did acts toward the commission of the crime of (name intended crime) which demonstrate unequivocally, under all of the circumstances, that the defendant intended to and would have committed the crime of (name intended crime) except for the intervention of another person or some other extraneous factor.[5]

**Meaning of "Unequivocally"**

"Unequivocally" means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances.[6]

**Meaning of "Another Person"**

"Another person" means anyone but the defendant and may include the intended victim.

**Meaning of "Extraneous Factor"**

An "extraneous factor"[7] is something outside the knowledge of the defendant or outside the defendant's control.[8]

**Deciding About Intent**

You cannot look into a person's mind to find intent. Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.

 

**Jury's Decision**

If you are satisfied beyond a reasonable doubt that all the elements of attempted (name intended crime) have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

**COMMENT**

Wis JI-Criminal 580 was originally published in 1967 and revised in 1979, 1988, 1995, 2001, and 2002. The 2002 revision involved nonsubstantive changes to the text and revision of the directions in the text at footnote 4. This revision was approved by the Committee in December 2012; it updated the Comment.

Subsection (1) of § 939.32 states the general rule that attempt liability applies only to felonies, plus four specified misdemeanors: § 940.19 Battery; § 940.195 Battery to an unborn child; § 943.20 Theft; and, § 943.74 Theft of farm-raised fish. These subsections enumerate all the offenses which may be prosecuted as 'attempts'." State v. Cvorovic, 158 Wis.2d 630, 634, 462 N.W.2d 897 (Ct. App. 1990). Thus, "attempted fourth degree sexual assault" is not a prosecutable offense. Ibid.

Several offenses are defined to include attempts as violations of the statute involved. These are included in the list found at subsections (1)(c) through (g) of § 939.32. Uniform instructions for these offenses suggest building in the substance of Wis JI-Criminal 580 in summary form. See, for example, Wis JI-Criminal 1290-1296, Intimidation of Victims and Witnesses under §§ 940.42-.46; Wis JI-Criminal 2134, Child Enticement under § 948.07; and Wis JI-Criminal 6030, Possession of a Controlled Substance under § 961.41.

The general rule is that the maximum fine and maximum term of imprisonment for an attempt is half that for the completed crime. § 939.32(1g)(a) and (b)1. The maximum penalty for attempts to commit Class A felonies is that for a Class B felony. Subsections (1g)(b)2. specifies how penalty enhancement provisions affect the penalties. Subsection (1m) specifies how bifurcated sentences are to be structured for attempts.

An issue that has received extensive attention in connection with attempt is commonly discussed in terms of "impossibility": Is a person guilty of an attempt if it was "impossible" for the crime to be committed under the circumstances? This issue was addressed in State v. Kordas, 191 Wis.2d 124, 528 N.W.2d 483 (Ct. App. 1993), where the defendant was charged with an attempt to receive stolen property based on his buying a motorcycle from an undercover police officer. The police had made representations to Kordas that the cycle was stolen when, in fact, it had been provided to the Milwaukee Police Department for educational purposes. The trial court dismissed the charge, holding that it was "legally impossible" to attempt to receive stolen property where, in fact, the property is not stolen. The court of appeals reversed:

> . . . Kordas did in fact possess the necessary criminal intent to commit the crime of receiving stolen property. The extraneous factor C that the motorcycle was not stolen C was unknown to him and had no impact on his intent. Thus the legal impossibility not apparent to Kordas should not absolve him from the offense of attempt to commit the crime he intended. 191 Wis.2d 124, 130 (citations omitted).

 

On the crime of attempt generally, see State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Oakley v. State, 22 Wis.2d 298, 125 N.W.2d 657 (1964). Also see: State v. Henthorn, 218 Wis.2d 526, 581 N.W.2d 544 (Ct. App. 1998), finding the evidence insufficient to support a charge of attempt to obtain a controlled substance by fraud; and State v. Briggs, 218 Wis.2d 61, 579 N.W.2d 783 (Ct. App. 1998), holding that the crime of attempted felony murder does not exist.

1. For example, if the crime charged is attempted burglary, the first part of this sentence would read: "The crime of attempted burglary, as defined in § 939.32 and § 943.10 of the Criminal Code of Wisconsin . . ."

2. The instruction identifies two elements for this offense: (1) intent to commit the crime; and (2) acts which demonstrate unequivocally that the defendant intended to commit and would have committed the crime except for the intervention of another person or some other extraneous factor.

In Berry v. State, 90 Wis.2d 316, 280 N.W.2d 204 (1979), the Wisconsin Supreme Court agreed with this analysis by reversing a decision of the Wisconsin Court of Appeals (see Berry v. State, 87 Wis.2d 85, 273 N.W.2d 376 (Ct. App. 1978)), which had concluded that proof of failure to complete the crime was an essential element of attempt. The supreme court held that "[f]ailure, if and by whatever means the actor's efforts are frustrated, is relevant only insofar as it may negate any inference that the actor did in fact possess the necessary criminal intent to commit the crime in question." 90 Wis.2d 316, 327. This conclusion is consistent with this instruction.

3. See State v. Weeks, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), which discusses the meaning of the intent required for attempts after the 1989 revision of the statute defining "intent." (See § 939.23, discussed in Wis JI-Criminal 923A and 923B.)

4. List the elements set forth in the uniform instruction for the intended crime. Elements beginning with "the defendant" should be modified by deleting those words. Other minor modifications may also be required. The defendant charged with an attempt will not have completed the crime and therefore will not have committed each of the elements. However, the defendant must have intended that all elements of the crime be completed and must have acted with the intent and knowledge required for the completed crime. The Committee recommends including definitions from the uniform instructions when requested or when the evidence has focused on an issue addressed by a definition. Note that some definitions include requirements that are of equal importance to elements of crimes. See, for example, the definitions of "sexual contact" provided in Wis JI-Criminal 1200A and 2101A.

See Wis JI-Criminal 581 EXAMPLE and 582 EXAMPLE for illustrations of how the elements of burglary and armed robbery would be integrated with the general pattern instruction for attempt cases involving attempted burglary and attempted armed robbery. Wis JI-Criminal 1070 provides a model for attempted first degree intentional homicide.

5. The presence of an "extraneous factor" is not a fact which must be separately proved by the state. Rather, it helps define the intent which the defendant must have. See State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988), discussed in note 8, below.

"Extraneous factor" is retained in the instruction for several reasons: it is part of the statutory definition; it does help the jury understand the intent required; and, as a practical matter, most attempt cases do involve an "extraneous factor" that has interrupted the defendant's activities.

 

The "extraneous factor" issue is discussed in State v. Damms, supra, and Adams v. State, 57 Wis.2d 515, 204 N.W.2d 657 (1973).

6. The "unequivocal act" requirement is discussed in State v. Damms, 9 Wis.2d 183, 100 N.W.2d 592 (1960), and Bethards v. State, 45 Wis.2d 606, 173 N.W.2d 634 (1970).

7. See note 5, supra.

8. The version of Wis JI Criminal 580 in effect from 1967 to the time of the 1988 revision included a footnote on "voluntary desistance" at this point in the text. The note suggested that:

> [w]here there is evidence that the defendant voluntarily desisted, or there is evidence that because of facts that were known to the defendant, it was impossible for him to commit the crime, insert the following paragraph in the instruction:
>
> If the defendant did not commit the crime of ____ (because he voluntarily desisted) or (because of facts, known to the defendant, which made it impossible for him to commit the crime), he is not guilty of attempted _____.

Wis JI-Criminal 580 © 1980.

This reference was deleted in 1988 because of the decision of the Wisconsin Supreme Court in State v. Stewart, 143 Wis.2d 28, 420 N.W.2d 44 (1988). In Stewart, the defendant and Moore confronted a person in a semi-enclosed bus stop shelter. They demanded that the person "give us some change" three or four times in an increasingly loud voice. At one point, Stewart reached into his coat, whereupon Moore told him to "put that gun away." Then a third associate, Levy, stepped into the bus shelter and said to Stewart and Moore: "Come on, let's go." The three men left, though Moore later returned and made small talk with the person from whom money had been requested.

The Wisconsin Supreme Court affirmed Stewart's conviction for attempted robbery. The court did not decide the case on the more narrow grounds of sufficiency of the evidence or whether the victim's resistance and Levy's intervention constituted an "extraneous factor." Rather, the court stated a broader rationale, interpreting § 939.32(3) as follows:

> [T]o prove attempt, the state must prove an intent to commit a specific crime accompanied by sufficient acts to demonstrate unequivocally that it was improbable the accused would desist of his or her own free will. The intervention of another person or some other extraneous factor that prevents the accused from completing the crime is not an element of the crime of attempt. If the individual, acting with the requisite intent, commits sufficient acts to constitute an attempt, voluntary abandonment of the crime after that point is not a defense.

143 Wis.2d, 28, 31.

The court dealt with three issues raised by the defendant. First, the court found the evidence was sufficient to support "the first element of attempted robbery – intent to commit robbery." 143 Wis.2d 28, 37.

 

Second, the court found that Stewart "went far enough" in pursuance of this intent to constitute an attempt. The court rejected Stewart's contention that:

> . . . sufficient acts are not committed until the intervention of another person or extraneous factor prevents completion of the crime. If there is no such intervention, the defendant argues, the acts taken toward the criminal end are too few to constitute an attempt. In effect the defendant argues that § 939.32(3) requires the state to prove that "the intervention of another person or some other extraneous factor" impeded the defendant's completion of the crime.

143 Wis.2d 28, 38.

Rather, the court concluded that the statute does not require that the defendant's conduct be interrupted by another person or some other extraneous factor:

> When the accused's acts demonstrate unequivocally that the accused will continue unless interrupted, that is, when the acts demonstrate that the accused will probably not desist from the criminal course, then the accused's dangerousness is manifest. Accordingly we reject defendant's assertion that § 939.32(3) requires the state to prove the intervention of another person or an extraneous factor.
>
> The purpose of the language in § 939.32(3) relating to intervention of another person and extraneous factor is to denote that the actor must have gone far enough toward completion of the crime to make it improbable that he would change his mind and desist. The conduct element of § 939.32(3) is satisfied when the accused engages in conduct which demonstrates that only a circumstance beyond the accused's control would prevent the crime, whether or not such a circumstance actually occurs. An attempt occurs when the accused's acts move beyond the incubation period for the crime, that is, the time during which the accused has formed an intent to commit the crime but has not committed enough acts and may still change his mind and desist. In other words the statute requires a judgment in each case that the accused has committed sufficient acts that it is unlikely that he would have voluntarily desisted from commission of the crime.

143 Wis.2d 28, 41-42.

The third issue considered was Stewart's claim that the "voluntary abandonment of criminal conduct after the attempt was complete but before the crime of robbery was consummated excuses him from criminal liability." 143 Wis.2d 28, 44. The court held that § 939.32(3) does not expressly recognize voluntary abandonment as a defense and further held that State v. Hamiel, 92 Wis.2d 656, 285 N.W.2d 639 (1979), did not embrace such a defense either. In the absence of express legislative recognition of the voluntary abandonment (or "voluntary desistance") defense, the court held it was not proper for the court to create it.

Therefore, after Stewart, it is clear that once the defendant "has gone far enough" to constitute an attempt, a decision to end the conduct will not relieve the person of criminal liability for an attempt to commit a crime. Deciding when the attempt has really occurred will continue to be a potentially difficult factual question after Stewart, which the jury will have to resolve by reference to the legal standard provided by § 939.32: Do the defendant's acts demonstrate unequivocally that he intended to commit a crime?

 