

16.5 Attempted Murder (18 U.S.C. § 1113)

The defendant is charged in [Count _____ of] the indictment with attempted murder in violation of Section 1113 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant did something that was a substantial step toward killing [name of intended victim];

Second, when the defendant took that substantial step, the defendant intended to kill [name of intended victim]; and

Third, the attempted killing occurred at [specify place of federal jurisdiction].

A “substantial step” is conduct that strongly corroborated the defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

Comment

“To constitute a substantial step, a defendant’s actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.” *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)).

The “strongly corroborated” language in this instruction comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (per curiam) (“A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent.”) and *United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (same).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

See *Braxton v. United States*, 500 U.S. 344, 351 (1991) (“Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.” (citations omitted)). Although one acting “recklessly with extreme disregard for human life” can be convicted of murder if a killing results (see Instruction 16.1 (Murder—First

Degree) and 16.2 (Murder—Second Degree)), that same recklessness cannot support a conviction of attempted murder if, fortuitously, no one is killed. *See United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994) (holding that under 18 U.S.C. § 1113, attempted murder conviction requires proof of specific intent to kill; recklessness and wanton conduct, grossly deviating from a reasonable standard of care such that defendant was aware of the serious risk of death, would not suffice as proof of an intent to kill).

“[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime.” *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003).

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