The pages that follow are redline ~~strikeout~~ copies of 9th Circuit criminal jury instructions that changed in January 2019.

3.5 REASONABLE DOUBT-DEFINED

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the government prove guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Comment

The Ninth Circuit has held that giving the language of this model instruction "did not constitute plain error." United States v. Ruiz, 462 F.3d 1082, 1087 (9th Cir.2006) (citing United States v. Nelson, 66 F.3d 1036, 1045 (9th Cir.1995)). Accord United States v. Soto-Zuniga, 837 F.3d 992, 1004 (9th Cir.2016) (rejecting challenge to this instruction and noting that Ninth Circuit has repeatedly upheld use of this instruction). In United States v. Gomez, 725 F.3d 1121, 1131 (9th Cir.2013), the Ninth Circuit approved the conditional language in this model instruction regarding a jury's duty in a criminal case. Nonetheless, "[t]he Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Id. (citing United States v. Artero, 121 F.3d 1256, 1258 (9th Cir.1997)). In addition, the Ninth Circuit has expressly approved a reasonable doubt instruction that informs the jury that the jury must be "firmly convinced" of the defendant's guilt. United States v. Velasquez, 980 F.2d 1275, 1278 (9th Cir.1992).

In Victor v. Nebraska, 511 U.S. 1, 5 (1994), the Court held that any reasonable doubt instruction must (1) convey to the jury that it must consider only the evidence, and (2) properly state the government's burden of proof. See also Gibson v. Ortiz, 387 F.3d 812, 820 (9th Cir.2004), overruled on other grounds by Byrd v. Lewis, 566 F.3d 855 (9th Cir.2009), and United States v. Ramirez, 136 F.3d 1209, 1213-14 (9th Cir.1998).

The Ninth Circuit has repeatedly upheld this instruction. See, e.g., United States v. Mikhel, 889 F.3d 1003, 1033 (9th Cir. 2018) (rejecting defendant's argument that jury can use speculation to find reasonable doubt in favor of accused); see also Victor v. Nebraska, 511 U.S. 1, 17 (1994) ("doubt that does not rise above pure speculation is not reasonable").

Care should be taken to ensure that the language used in a verdict form does not require the jury to find the defendant not guilty beyond a reasonable doubt in order to acquit. See United States v. Espino, 892 F.3d 1048, 1053 (9th Cir. 2018).

Approved ~~6/2018~~1/2019

6.4 INSANITY

The defendant contends [he] [she] was insane at the time of the crime. Insanity is a defense to the charge. The sanity of the defendant at the time of the crime charged is therefore a question you must decide.

A defendant is insane only if at the time of the crime charged:

1. The defendant had a severe mental disease or defect; and

2. As a result, the defendant was unable to appreciate the nature and quality or the wrongfulness of [his] [her] acts.

The defendant has the burden of proving the defense of insanity by clear and convincing evidence. Clear and convincing evidence of insanity means that it is highly probable that the defendant was insane at the time of the crime. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

You may consider evidence of the defendant's mental condition before or after the crime to decide whether the defendant was insane at the time of the crime. Insanity may be temporary or extended.

Your finding on the question of whether the defendant was insane at the time of the crime must be unanimous.

[Your verdict form will allow you to select from three possible verdicts:

If you unanimously agree that the government has failed to prove the defendant guilty beyond a reasonable doubt, you must select "not guilty";

If you unanimously agree that the government has proven the defendant guilty beyond a reasonable doubt, you must select "guilty";

If you unanimously agree that the government has proven the defendant guilty beyond a reasonable doubt, but you also unanimously agree that the defendant has proven by clear and convincing evidence that [he] [she] was insane at the time of the crime charged, you must select "not guilty only by reason of insanity."]

Comment

The insanity defense and the burden of proof are set forth in 18 U.S.C. § 17. Clear and convincing evidence requires that the existence of a disputed fact be highly probable. Colorado v. New Mexico, 467 U.S. 310, 316 (1984). When an affirmative defense of insanity is submitted to the jury, unanimity is required on both questions of guilt and sanity. "[A] jury united as to guilt but divided as to an affirmative defense (such as

insanity) is necessarily a hung jury." United States v. Southwell, 432 F.3d 1050, 1055 (9th Cir.2005).

A special verdict is required to resolve an insanity defense~~.~~ if requested by the government or the defendant, or on the court's own motion. See 18 U.S.C. § 4242(b).

The final bracketed section should be included in such instances.

When asserting an insanity defense to a continuing offense, such as illegal reentry under 8 U.S.C. § 1326(a), a defendant must prove that he or she was legally insane for "virtually the entire duration" of his or her crime. See United States v. Alvarez-Ulloa, 784 F.3d 558, 568 (9th Cir.2015) (approving supplemental jury instruction in 8 U.S.C. § 1326(a) prosecution informing jury that insanity defense is negated if defendant ceased being insane for period long enough that he could have reasonably left United States, but knowingly remained).

Approved ~~6/2015~~1/2019

6.8 SELF-DEFENSE

The defendant has offered evidence of having acted in self-defense. Use of force is justified when a person reasonably believes that it is necessary for the defense of oneself or another against the immediate use of unlawful force. However, a person must use no more force than appears reasonably necessary under the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense.

Comment

The Ninth Circuit has found that the first two paragraphs of this instruction adequately inform the jury of defendant's defense where "[t]he court also instructed the jury that the prosecution bore the burden of proving beyond a reasonable doubt that the defendant had not acted in reasonable self-defense." United States v. Keiser, 57 F.3d 847, 850-52 (9th Cir. 1995). See also United States v. Morsette, 622 F.3d 1200, 1202 (9th Cir. 2010) ("the model jury instruction remains correct").

Failure of the trial court to instruct the jury that the government has the burden of disproving self-defense is reversible error. United States v. Pierre, 254 F.3d 872, 876 (9th Cir. 2001). When there is evidence of self-defense, an additional element should be added to the instruction on the substantive offense: for example, "Fourth, the defendant did not act in reasonable self-defense."

A defendant is entitled to a self-defense instruction when "there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." United States v. Sanchez-Lima, 161 F.3d 545, 549 (9th Cir. 1998).

The jury must unanimously reject the defendant's self-defense theory in order to find the defendant guilty. United States v. Ramirez, 537 F.3d 1075, 1083 (9th Cir. 2008).

This instruction is not appropriate when the defendant is charged with violating the Endangered Species Act. See United States v. Wallen, 874 F.3d 620, 628-29 (9th Cir. 2017) (holding that it was error to apply standard self-defense instruction to defense based on defendant's 'good faith belief'"); see also United States v. Charette, 893 F.3d 1169, 1175-76 (9th Cir. 2018) (same).

See also Comment to Instruction 4.5 (Character of Victim) for a discussion of the admissibility of the victim's character where self-defense is claimed.

For self-defense claims involving excessive force, see United States v. Ornelas, 906 F.3d 1138, 1147-48 (9th Cir. 2018).

Approved ~~9/2018~~

1/2019

6.9 ~~INTOXICATION~~ DIMINISHED CAPACITY

Evidence has been admitted that the defendant may have [been intoxicated] [suffered from diminished capacity] at the time that the crime charged was committed.

[Intoxication can result from being under the influence of alcohol or drugs or both.]

You may consider evidence of the defendant's [intoxication] [diminished capacity] in deciding whether the government has proved beyond a reasonable doubt that the defendant acted with the intent required to commit [specify crime charged].

Comment

A defense based on voluntary intoxication is available only for specific intent crimes. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1195 (9th Cir. 2000); United States v. Dare, 425 F.3d 634, 641 n.3 (9th Cir. ~~2005) ("Voluntary intoxication is not a defense to a general intent offense."), cert. denied, 548 U.S. 915 (2006).~~ 2005) ("Voluntary intoxication is not a defense to a general intent offense."). However, a voluntary intoxication instruction may be appropriate where the jury also receives an attempt instruction-even if the completed crime is a general intent crime-because "attempt includes an element of specific intent even if the crime attempted does not." United States v. Sneezer, 900 F.2d 177, 179 (9th Cir. 1990); see Gracidas-Ulibarry, 231 F.3d at 1193 ("When the defendant's conduct does not constitute a completed criminal act, . . . a heightened intent requirement is necessary to ensure that the conduct is truly culpable." (citing Sneezer, 900 F.2d at 180)).

Likewise, diminished capacity is a defense only when ~~a~~ specific intent is at issue. United States v. Twine, 853 F.2d 676, 679 (9th Cir. 1988). The diminished capacity defense is "concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime~~. Id. at 678.~~

~~_____~~." Id. at 678. Evidence that the defendant suffers from some mental illness is insufficient by itself to require a diminished capacity instruction. United States v. Christian, 749 F.3d 806, 815 (9th Cir. 2014). Rather, there must be some evidence (however weak) of a link between the defendant's mental illness and his ability to form a specific intent. Christian, 749 F.3d at 815 (citing United States v. Washington, 819 F.2d 221, 225 (9th Cir. 1987)).

Approved 1/2019

8.1 ARSON OR ATTEMPTED ARSON
(18 U.S.C. § 81)

The defendant is charged in [Count _____ of] the indictment with [attempted] arson in violation of Section 81 of Title 18 of the United States Code. In order 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 [[intentionally set fire to or burned] [intended to set fire to or burn]] [specify building];

Second, [specify building] was located on [specify place of federal jurisdiction]; [and]

Third, the defendant acted wrongfully and without justification[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

[If you decide that the defendant is guilty, you must then decide whether the government has proved beyond a reasonable doubt that [the building was regularly used by people as a place in which to live and sleep] [a person's life was placed in jeopardy].]

Comment

If the charge is conspiracy to commit the crime, use Instruction 8.2 (Conspiracy to Commit Arson).

As to the second element of the instruction regarding federal jurisdiction, "special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7. While federal jurisdiction over the place may be determined as a matter of law, the locus of the offense within that place is an issue for the jury. United States v. Gipe, 672 F.2d 777, 779 (9th Cir. 1982).

~~For~~The bracketed language stating an additional element applies only when the charge is an attempt~~ to commit~~. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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~~ 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).

"[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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.3 ASSAULT ON FEDERAL OFFICER OR EMPLOYEE (18 U.S.C. § 111(a))

The defendant is charged in [Count _____ of] the indictment with assault on a federal officer in violation of Section 111(a) of Title 18 of the United States Code. In order 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 forcibly assaulted [name of federal officer or employee]; [and]

Second, the defendant did so while [name of federal officer or employee] was engaged in, or on account of [his] [her] official duties[.] [; and]

[Third, the defendant [made physical contact] [acted with the intent to commit another felony].]

There is a forcible assault when one person intentionally strikes another, or willfully attempts to inflict injury on another, or intentionally threatens another coupled with an apparent ability to inflict injury on another which causes a reasonable apprehension of immediate bodily harm.

Comment

When the crime is charged under the enhanced penalty provisions of 18 U.S.C. § 111(b), use Instruction 8.4 (Assault on Federal Officer [With a Deadly or Dangerous Weapon] [Which Inflicts Bodily Injury]).

See 18 U.S.C. § 1114 for the definition of federal officer or employee referenced in 18 U.S.C. § 111.

The third element is to be used only when the charge is a felony. A felony charge requires actual physical contact or action with the intent to commit another felony.

A reasonable apprehension of immediate bodily harm is determined with reference to a reasonable person aware of the circumstances known to the victim, not with reference to all circumstances, including circumstances unknown to the victim. United States v. Acosta-Sierra, 690 F.3d 1111, 1121 (9th Cir. 2012).

The statutory language states that the crime can be committed by one who "forcibly assaults, resists, opposes, impedes, intimidates or interferes," but the Ninth Circuit has held that regardless of the circumstances, the conduct is not criminal unless it includes an assault. United States v. Chapman, 528 F.3d 1215, 1221 (9th Cir. 2008). Similarly, the court has held that a proper instruction may not reduce the concept of force or threatened force to the mere appearance of physical intimidation. United States v. Harrison, 585 F.3d 1155, 1160 (9th Cir. 2009).

There is no requirement that an assailant be aware that the victim is a federal officer. United States v. Feola, 420 U.S. 671, 684 (1975); see also United States v. Mobley, 803 F.3d 1105, 1109 (9th Cir. 2015) (citing Feola and holding that defendant's lack of knowledge as to victim's status as federal officer was "irrelevant to establishing the wrongfulness of the defendant's conduct" in prosecution for assault of federal officer). If the defendant denies knowledge that the person assaulted was a federal officer and claims to have acted in self-defense, Instruction 8.5 (Assault on Federal Officer or Employee-Defenses) should be used.

Violation of § 111 is a general intent crime in this circuit. United States v. Jim, 865 F.2d 211, 215 (9th Cir. 1989). Among other things, this means that voluntary intoxication is not a defense. Id.

For an instruction defining "official duties," see United States v. Ornelas, 906 F.3d 1138, 1149 (9th Cir. 2018) (upholding an "official duties" instruction providing that: "the test" for determining whether an officer is "[e]ngaged in the performance of official duties" is "whether the officer is acting within the scope of his employment, that is, whether the officer's actions fall within his agency's overall mission, in contrast to engaging in a personal frolic of his own"); see also United States v. Juvenile Female, 566 F.3d 943, 950 (9th Cir. 2009) (describing official duties test as "whether [the officer] is acting within the scope of what he is employed to do, as distinguished from engaging in a personal frolic of his own").

Approved ~~12/2015~~1/2019

8.4 ASSAULT ON FEDERAL OFFICER OR EMPLOYEE [WITH A DEADLY OR DANGEROUS WEAPON] [WHICH INFLICTS BODILY INJURY] (18 U.S.C. § 111(b))

The defendant is charged in [Count _____ of] the indictment with assault on a federal officer in violation of Section 111(b) of Title 18 of the United States Code. In order 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 forcibly assaulted [name of federal officer or employee];

Second, the defendant did so while [name of federal officer or employee] was engaged in, or on account of [his] [her] official duties; and

Third, the defendant [used a deadly or dangerous weapon] [inflicted bodily injury].

There is a forcible assault when one person intentionally strikes another, or willfully attempts to inflict injury on another, or intentionally threatens another coupled with an apparent ability to inflict injury on another which causes a reasonable apprehension of immediate bodily harm.

[A [specify weapon] is a deadly or dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.]

Comment

See 18 U.S.C. § 1114 for the definition of federal officer or employee referenced in 18 U.S.C. § 111.

The statutory language states that the crime can be committed by one who "forcibly assaults, resists, opposes, impedes, intimidates or interferes," but the Ninth Circuit has held that regardless of the circumstances, the conduct is not criminal unless it includes an assault. United States v. Chapman, 528 F.3d 1215, 1221 (9th Cir. 2008).

There is no requirement that an assailant be aware that the victim is a federal officer. United States v. Feola, 420 U.S. 671, 684 (1975); see also United States v. Mobley, 803 F.3d 1105, 1109 (9th Cir. 2015) (citing Feola and holding that defendant's lack of knowledge as to victim's status as federal officer was "irrelevant to establishing the wrongfulness of the defendant's conduct" in prosecution for assault of federal officer). If the defendant denies knowledge that the person assaulted was a federal officer and claims to have acted in self-defense, Instruction 8.5 (Assault on Federal Officer or Employee-Defenses) should be used.

A reasonable apprehension of immediate bodily harm is determined with reference to a reasonable person aware of the circumstances known to the victim, not with reference to all circumstances, including circumstances unknown to the victim. United States v. Acosta-Sierra, 690 F.3d 1111, 1121 (9th Cir. 2012).

Violation of § 111 is a general intent crime in this circuit. United States v. Jim, 865 F.2d 211, 215 (9th Cir. 1989). Among other things, this means that voluntary intoxication is not a defense, id., and that § 111(b) does not require an intent to cause the bodily injury. United States v. Garcia-Camacho, 122 F.3d 1265, 1269 (9th Cir. 1997).

For an instruction defining "official duties," see United States v. Ornelas, 906 F.3d 1138, 1149 (9th Cir. 2018) (upholding an "official duties" instruction providing that: "the test" for determining whether an officer is "[e]ngaged in the performance of official duties" is "whether the officer is acting within the scope of his employment, that is, whether the officer's actions fall within his agency's overall mission, in contrast to engaging in a personal frolic of his own"); see also United States v. Juvenile Female, 566 F.3d 943, 950 (9th Cir. 2009) (describing official duties test as "whether [the officer] is acting within the scope of what he is employed to do, as distinguished from engaging in a personal frolic of his own").

Approved ~~12/2015~~1/2019

8.20 CONSPIRACY-ELEMENTS

The defendant is charged in [Count _____ of] the indictment with conspiring to _____ in violation of Section _____ of Title ___ of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about [date], and ending on or about [date], there was an agreement between two or more persons to commit at least one crime as charged in the indictment; [and]

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it[.] [; and]

[Third, one of the members of the conspiracy performed at least one overt act [on or after [date]] for the purpose of carrying out the conspiracy.]

A conspiracy is a kind of criminal partnership-an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

[An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.]

Comment

When the charged offense is conspiracy to defraud the United States (or any agency thereof) under the "defraud clause" of 18 U.S.C. § 371, use Instruction 8.21 (Conspiracy to Defraud the United States) in place of this general conspiracy instruction.

"To prove a conspiracy under 18 U.S.C. § 371, the government must establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." United States v. Kaplan, 836 F.3d 1199, 1212 (9th Cir. 2016) (citation and internal quotation marks omitted). "The agreement need not be explicit; it is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture." United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir. 2004) (citing United States v. Romero, 282 F.3d 683, 687 (9th Cir. 2002)). A conspiracy may exist even if some members of the conspiracy cannot complete the offense, so long as the object of the conspiracy is that at least one conspirator complete the offense. Ocasio v. United States, 136 S.Ct. 1423, 1429-32 (2016).

With respect to the first element in this instruction, if other jury instructions do not set out the elements of the crimes alleged to be objects of the conspiracy, the elements must be included in this or an accompanying instruction. United States v. Alghazouli, 517 F.3d 1179, 1189 (9th Cir. 2008). Nevertheless, conspiracy to commit a crime "does not require completion of the intended underlying offense." United States v. Iribe, 564 F.3d 1155, 1160-61 (9th Cir. 2009).

To prove an agreement to commit a crime, it is not sufficient for the government to prove that the defendant committed the crime in question. It must prove that the defendant agreed with at least one other person to commit that crime. United States v. Loveland, 825 F.3d 555 (9th Cir. 2016). A defendant who conspires only with a government agent is not guilty of conspiracy;
however, a conspiracy conviction is permitted if at least one co-conspirator is not a government
agent. United States v. Barragan, 871 F.3d 689, 710-11 (9th Cir. 2017); see also Instruction 8.26 (Conspiracy-Sears Charge). "An agreement to commit a crime can be explicit or tacit, and can be proved by direct or circumstantial evidence, including inferences from circumstantial evidence." Kaplan, 836 F.3d at 1212 (quotation marks and citation omitted).
See also United States v. Gonzalez, 906 F.3d 784, 792 (9th Cir. 2018) (noting that tacit agreement is sufficient for conspiracy conviction).

Use the third element in this instruction only if the applicable statute requires proof of an overt act, e.g., 18 U.S.C. § 371 (first clause) or 18 U.S.C. § 1511(a) (conspiracy to obstruct state or local law enforcement), but omit the third element when the applicable statute does not require proof of an overt act. See Whitfield v. United States, 543 U.S. 209, 212-15 (2005) (proof of overt act not necessary for conspiracy to commit money laundering); ~~and~~ United States v. Shabani, 513 U.S. 10, 15-16 (1994) (proof of overt act not necessary for conspiracy to violate drug statutes~~).~~

); Gonzalez, 906 F.3d at 792 (noting that proof of overt act is not necessary for conspiracy to violate civil rights).

As long as jurors agree that the government has proven each element of a conspiracy, they need not unanimously agree on the particular overt act that was committed in furtherance of the agreed-upon conspiracy. See United States v. Gonzalez, 786 F.3d 714, 718-19 (9th Cir. 2015) (rejecting defendant's argument that district court erred in failing to instruct jury that it must unanimously agree on which acts constituted conspiracy to murder underlying a VICAR charge).

When there is evidence that an overt act occurred outside the applicable limitations period, include the bracketed material within the third element. See United States v. Fuchs, 218 F.3d 957, 961-62 (9th Cir. 2000) (plain error not to require jury to find that overt act occurred within statute of limitations).

See Instruction 7.9 (Specific Issue Unanimity). When the evidence establishes multiple conspiracies, failure to give a specific unanimity instruction may be plain error and the court may have a duty to sua sponte give the instruction requiring the jurors to unanimously agree on which conspiracy the defendant participated in. United States v. Lapier, 796 F.3d 1090 (9th Cir. 2015) (failure to give specific unanimity instruction was plain error because half of jury could have found defendant guilty of joining one conspiracy while other half of jury could have found defendant guilty of joining second, completely independent conspiracy).

The Supreme Court has held that "[a] conspiracy does not automatically terminate simply because the Government, unbeknownst to some of the conspirators, has 'defeated' the conspiracy's 'object'." United States v. Jimenez Recio, 537 U.S. 270, 274 (2003).

When the charged offense is a drug conspiracy under 21 U.S.C. § 846, use Instruction 9.19A (Buyer-Seller Relationship) in place of this general conspiracy instruction. Instruction 9.19A (Buyer-Seller Relationship) may be modified for non-drug conspiracies.

Approved ~~12/2016~~1/2019

8.25 CONSPIRACY-LIABILITY FOR SUBSTANTIVE OFFENSE COMMITTED BY CO-CONSPIRATOR (PINKERTON CHARGE)

Each member of the conspiracy is responsible for the actions of the other conspirators performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed that crime.

Therefore, you may find the defendant guilty of [specify crime] as charged in Count _____ of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

First, a person named in Count _____ of the indictment committed the crime of [specify crime] as alleged in that count;

Second, the person was a member of the conspiracy charged in Count _____ of the indictment;

Third, the person committed the crime of [specify crime] in furtherance of the conspiracy;

Fourth, the defendant was a member of the same conspiracy at the time the offense charged in Count _____ was committed; and

Fifth, the offense fell within the scope of the unlawful agreement and could reasonably have been foreseen to be a necessary or natural consequence of the unlawful agreement.

Comment

The Pinkerton charge derives its name from Pinkerton v. United States, 328 U.S. 640 (1946), which held that a defendant could be held liable for a substantive offense committed by a co-conspirator as long as the offense occurred within the course of the conspiracy, was within the scope of the agreement, and could reasonably have been foreseen as a necessary or natural consequence of the unlawful agreement. United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1202 (9th Cir. 2000).

When this instruction is appropriate, it should be given in addition to Instruction 8.20 (Conspiracy-Elements).

This instruction is based upon United States v. Alvarez-Valenzuela, 231 F.3d at 1202-03, in which the Ninth Circuit approved of the 1997 version of Instruction 8.5.5 (Conspiracy-Pinkerton Charge), and United States v. Montgomery, 150 F.3d 983, 996-97 (9th Cir. 1998). See also United States v. Gonzalez, 906 F.3d 784, 791-92 (9th Cir. 2018); United States v. Gadson, 763 F.3d 1189 (9th Cir. 2014).

This instruction was found adequate in a case in which three separate conspiracies were charged. See United States v. Moran, 493 F.3d 1002 (9th Cir. 2007). However, given the potential for ambiguity where

more than one conspiracy is charged, the court should consider giving separate Pinkerton instructions for each conspiracy charged.

Approved ~~3/2015~~1/2019

8.28 PASSING OR ATTEMPTING TO PASS COUNTERFEIT OBLIGATIONS (18 U.S.C. § 472)

The defendant is charged in [Count _____ of] the indictment with [[passing] [uttering] [publishing] [selling]] [[attempting to [pass] [utter] [publish] [sell]] a counterfeit obligation in violation of Section 472 of Title 18 of the United States Code. In order 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 [[passed] [uttered] [published] [sold]] [[attempted to [pass] [utter] [publish] [sell]] a [[falsely made] [forged] [counterfeit] [altered]] [specify obligation or security of United States];

Second, the defendant knew that the [specify obligation or security of United States] was [falsely made] [forged] [counterfeited] [altered]; [and]

Third, the defendant acted with the intent to defraud[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

To be counterfeit, a bill must have a likeness or resemblance to the genuine [specify obligation or security of United States].

Comment

For a definition of "intent to defraud," see Instruction 3.16 (Intent to Defraud-Defined).

An utterance has been described as tantamount to an offer. United States v. Chang, 207 F.3d 1169, 1174 (9th Cir. 2000).

~~For~~ The bracketed language stating an additional element applies only when the charge is an attempt~~ to commit~~. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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~~

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

"[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).

~~The "strongly~~ ~~corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.34 PASSING OR ATTEMPTING TO PASS
FORGED ENDORSEMENT ON
TREASURY CHECK, BOND OR
SECURITY OF UNITED STATES
(18 U.S.C. § 510(a)(2))

The defendant is charged in [Count _____ of] the indictment with [passing] [uttering] [publishing] [[attempting to [pass] [utter] [publish]] a Treasury [check] [bond] [security] of the United States in violation of Section 510 of Title 18 of the United States Code. In order 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 [passed] [uttered] [published] [[attempted to [pass] [utter] [publish]] a Treasury [check] [bond] [security] of the United States which bore a falsely made or forged [endorsement] [signature]; [and]

Second, the defendant did so with intent to defraud[.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

For a definition of "intent to defraud," see Instruction 3.16 (Intent to Defraud-Defined).

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

An utterance has been described as tantamount to an offer. United States v. Chang, 207 F.3d 1169, 1174 (9th Cir. 2000).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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). ~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

8.35 SMUGGLING OR ATTEMPTING TO SMUGGLE GOODS

(18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [smuggling] [attempting to smuggle] in violation of Section 545 of Title 18 of the United States Code. In order 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 knowingly [smuggled] [attempted to smuggle] merchandise into the United States without declaring the merchandise for invoicing as required by United States Customs law;

Second, the defendant knew that the merchandise was of a type that should have been declared; [and]

Third, the defendant acted willfully with intent to defraud the United States[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment in 5.5 (Willfully).

This instruction may be used when the defendant is charged with the crime of smuggling goods or attempting to smuggle goods. The bracketed fourth element should be used when defendant is charged with an attempt to smuggle goods. ~~For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

This instruction relates to the first clause of the first paragraph of 18 U.S.C. § 545. If the charge is based on the second clause of the first paragraph, use Instruction 8.36 (Passing False Papers Through Customhouse). Instructions 8.37 (Importing Merchandise Illegally) and 8.38 (Receiving, Concealing, Buying or Selling Smuggled Merchandise) concern violations of the second paragraph of § 545.

See United States v. Garcia-Paz, 282 F.3d 1212, 1214-15 (9th Cir. 2002) (court properly instructed jury that marijuana constitutes "merchandise" for purposes of 18 U.S.C. § 545).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

8.35A SMUGGLING OR ATTEMPTING TO SMUGGLE
GOODS FROM THE UNITED STATES
(18 U.S.C. § 554)

The defendant is charged in [Count ___] of the indictment with [smuggling] [attempting to smuggle] merchandise from the United States in violation of Section 554 of Title 18 of the United States Code. In order 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 [knowingly] [fraudulently] [exported] [sent] [attempted to export] [attempted to send] from the United States merchandise [or received, concealed, bought, sold or in any manner facilitated the transportation, concealment, or sale of such merchandise prior to exportation, knowing the same to be intended for exportation]; and

Second, the [exportation] [sending] was contrary to [describe applicable United States law(s) or regulation(s)]; and

Third, the defendant knew the [exportation] [sending] was contrary to law or regulation[.]; [and]

[Fourth, the defendant did something that was a substantial step toward committing the crime~~.~~ and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

"Merchandise" means objects, items, goods, and wares of every description.

Comment

This instruction may be used when the defendant is charged under 18 U.S.C. § 554 with the crime of smuggling or attempting to smuggle goods from the United States. The bracketed fourth element should be used when the defendant is charged with an attempt to smuggle goods from the United States. See Comment to Instruction 8.35 (Smuggling Goods).

To convict under 18 U.S.C. § 554, the government need only prove the defendant knew he or she was exporting merchandise that was unlawful to export, not that the defendant knew the nature of the merchandise. United States v. Rivero, 889 F.3d 618, 621-22 (9th Cir. 2018).

18 U.S.C. § 554 references "any merchandise, article, or object." The definition of "merchandise" is found in 19 U.S.C. § 1401(c). See United States v. Garcia-Paz, 282 F.3d 1212, 1214 (9th Cir. 2002) (defining "merchandise" as "goods, wares and chattels of every description").

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~9/2018~~

1/2019

8.36 PASSING OR ATTEMPTING TO PASS FALSE PAPERS THROUGH CUSTOMHOUSE (18 U.S.C. § 545)

The defendant is charged in [Count _____ of] the indictment with [passing] [attempting to pass] a [[false] [forged] [fraudulent]] [specify writing] in violation of Section 545 of Title 18 of the United States Code. In order 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 knowingly [[passed] [attempted to pass]] [specify writing] through a customhouse of the United States;

Second, the defendant knew that the [specify writing] was [false] [forged] [fraudulent];

Third, the defendant acted willfully with intent to defraud the United States; [and]

Fourth, the [specify writing] had a natural tendency to influence, or was capable of influencing, action by the United States[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment in 5.5 (Willfully).

This instruction may be used when the defendant is charged with the crime of passing false papers through a customhouse. The bracketed fifth element should be used when defendant is charged with an attempt to do so. For an attempt to commit the crime, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the crime. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).

This instruction relates to the second clause of the first paragraph of 18 U.S.C. § 545. If the charge is based on the first clause of the first paragraph, use Instruction 8.35 (Smuggling Goods). Instructions 8.37 (Importing Merchandise Illegally) and 8.38 (Receiving, Concealing,

Buying or Selling Smuggled Merchandise) concern violations of the second paragraph of § 545.

In Neder v. United States, 527 U.S. 1 (1999), the Court explained that materiality is a necessary aspect of the legal concept of fraud which is incorporated into criminal statutes concerning fraud unless the statute says otherwise. Id. at 22-23 (holding materiality of falsehood must be proved in prosecution under bank, mail and wire fraud statutes). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. United States v. Peterson, 538 F.3d 1064, 1072 (9th Cir. 2008).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

8.45 ATTEMPTED ESCAPE
(18 U.S.C. § 751(a))

The defendant is charged in [Count _____ of] the indictment with attempted escape in violation of Section 751(a) of Title 18 of the United States Code. In order 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 was in the custody of [specify custodian];

Second, the defendant was in custody by virtue of [specify reason for or type of custody];

Third, the defendant intended to escape from custody; and

Fourth, the defendant did something that was a substantial step toward escaping from custody and that strongly corroborated the defendant's intent to commit that crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.44 (Escape from Custody).

"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. ~~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).~~ 2007) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~ "[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).

Approved ~~3/2018~~1/2019

8.118 ATTEMPTED KIDNAPPING-
FOREIGN OFFICIAL OR
OFFICIAL GUEST
(18 U.S.C. § 1201(d))

The defendant is charged in [Count _____ of] the indictment with attempting to kidnap [a foreign official] [an official guest] [an internationally protected person] in violation of Section 1201(d) of Title 18 of the United States Code. In order 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 intended to [seize] [confine] [kidnap] and hold [a foreign official] [an official guest] [an internationally protected person] for ransom, reward or other benefit; and

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

"Foreign official," "official guest," and "internationally protected person" are defined in 18 U.S.C. § 1116(b).

~~"[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).~~

~~"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.~~ "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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.119 ATTEMPTED KIDNAPPING-
FEDERAL OFFICER
OR EMPLOYEE
(18 U.S.C. § 1201(d))

The defendant is charged in [Count _____ of] the indictment with attempting to kidnap a [federal officer] [federal employee] in violation of Section 1201(d) of Title 18 of the United States Code. In order 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 intended to [seize] [confine] [kidnap] and to hold a [federal officer] [federal employee], on account of or during the performance of official duties, for ransom, reward or other benefit; and

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

Federal officers or employees who may be victims of kidnapping are listed in 18 U.S.C. § 1114.

~~"[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).~~

~~"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). 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).~~

"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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. ~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~ Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

8.126A ATTEMPTED BANK FRAUD-SCHEME
TO DEPRIVE OF INTANGIBLE RIGHT OF
HONEST SERVICES
(18 U.S.C. §§ 1344(1) and 1346)

The defendant is charged in [Count _____ of] the indictment with attempted bank fraud in violation of Section 1344(1) of Title 18 of the United States Code. In order 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 devised or knowingly participated in a scheme or plan to deprive the [specify financial institution] of the right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant's services. The "exchange" may be express or may be implied from all the surrounding circumstances;

Third, the defendant owed a fiduciary duty to [specify financial institution];

Fourth, the defendant acted with the intent to defraud by depriving the [specify financial institution] of the right of honest services;

Fifth, the plan or scheme was material; that is, it had a natural tendency to, or was capable of depriving the [specify financial institution] of the right of honest services;

Sixth, the defendant did something that was a substantial step toward carrying out the plan or scheme to deprive the [specify financial institution] of the right of honest services, and that strongly corroborated the defendant's intent to commit that crime; and

Seventh, the [specify financial institution] was federally [chartered] [insured].

A "fiduciary" duty exists whenever one [person] [entity] places special trust and confidence in another person-the fiduciary-in reliance that the fiduciary will exercise [his] [her] discretion and expertise with the utmost honesty and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance that [he] [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary duty to the other. If one person engages or employs another and thereafter directs, supervises, or approves the other's actions, the person so employed is not necessarily a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence-usually

involving the exercise of professional expertise and discretion-that a fiduciary relationship exists.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.123 (Mail Fraud-Scheme to Defraud-Deprivation of Intangible Right of Honest Services).

For a definition of "financial institution," see 18 U.S.C. § 20.

"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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.128 ATTEMPTED BANK FRAUD- SCHEME TO DEFRAUD BY FALSE PROMISES
(18 U.S.C. § 1344)

The defendant is charged in [Count _____ of] the indictment with attempted bank fraud in violation of Section 1344 of Title 18 of the United States Code. In order 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 knowingly devised a plan or scheme to obtain money or property from the [specify financial institution] by false promises or statements;

Second, the promises or statements were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

Third, the defendant acted with the intent to defraud;

Fourth, the defendant did something that was a substantial step toward carrying out the plan or scheme and that strongly corroborated the defendant's intent to commit that crime; and

Fifth, [specify financial institution] was federally [chartered] [insured].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

In United States v. Molinaro, 11 F.3d 853, 863 (9th Cir. 1993), the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant's belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

The government need not prove the defendant knowingly made false representations directly to a bank. United States v. Cloud, 872 F.2d 846, 851 n.5 (9th Cir. 1989).

Materiality is an essential element of the crime of bank fraud. Neder v. United States, 527 U.S. 1 (1999). The common law test for

materiality in the false statement statutes, as reflected in the second element of this instruction, is the preferred formulation. United States v. Peterson, 538 F.3d 1064, 1072 (9th Cir. 2008).

For a definition of "financial institution," see 18 U.S.C. § 20.

"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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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~~ The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

. 2003).

Approved ~~3/2018~~1/2019

8.131A OBSTRUCTION OF JUSTICE-DESTRUCTION, ALTERATION OR FALSIFICATION OF RECORDS IN FEDERAL INVESTIGATIONS AND BANKRUPTCY
(18 U.S.C. § 1519)

The defendant is charged in [Count _____ of] the indictment with obstruction of justice in violation of Section 1519 of Title 18 of the United States Code. In order 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 knowingly altered, destroyed, concealed or falsified a record, document or tangible object; and

Second, the defendant acted with the intent to impede, obstruct or influence an actual or contemplated investigation of a matter within the jurisdiction of any department or agency of the United States.

[The government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.]

Comment

For a definition of "knowingly," see Instructions 5.7 (Knowingly-Defined) and 5.8 (Deliberate Ignorance).

Include the last paragraph if the evidence shows the defendant may have had more than one intention when engaging in the challenged conduct. See United States v. Smith, 831 F.3d 1207, 1218 (9th Cir.2016).

Reports prepared by law enforcement officers qualify as "records" or "documents" under § 1519. United States v. Gonzalez, 906 F.3d 784, 794 (9th Cir. 2018).

To qualify as a "tangible object" under the meaning of § 1519, an item must be "one used to record or preserve information." Yates v. United States, 135 S. Ct. 1074, 1088-89 (2015) (holding that fisherman's undersized fish were not "tangible objects" under § 1519).

Even when a defendant intends to obstruct justice, the government still must prove that the defendant actually altered, destroyed, concealed or falsified a record, document, or other tangible object used to record or preserve information, to secure a conviction under § 1519. United States v. Katakis, 800 F.3d 1017, 1030 (9th Cir. 2015) (affirming judgment of acquittal when government failed to prove that defendant who meant to delete emails successfully did so, and holding that moving emails into "deleted items" folder does not qualify as concealment under § 1519).

To sustain a conviction under § 1519, it is enough for the government to prove that the

defendant intended to obstruct the investigation of any matter as long as that matter falls within the jurisdiction of a federal department or agency. The defendant need not know that the matter in question falls within the jurisdiction of a federal department or agency. Gonzalez, 906 F.3d at 794 (9th Cir. 2018).

Approved ~~3/2018~~1/2019

8.139 ATTEMPTED MAIL THEFT

(18 U.S.C. § 1708)

The defendant is charged in [Count _____ of] the indictment with attempted mail theft in violation of Section 1708 of Title 18 of the United States Code. In order 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 intended to steal mail from a [post office] [letter box] [a private mail box] [mail receptacle] [mail route] [authorized depository for mail matter] [mail carrier]; and

Second, the defendant did something that was a substantial step toward stealing the mail and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.142 HOBBS ACT-EXTORTION OR ATTEMPTED EXTORTION BY FORCE (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by force, violence or fear in violation of Section 1951 of Title 18 of the United States Code. In order 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 [[induced] [intended to induce]] [name of victim] to part with property by the wrongful use of actual or threatened force, violence, or fear;

Second, the defendant obtained the property with [name of victim]'s consent;

Third, the defendant acted with the intent to obtain the property; [and]

Fourth, commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

For an instruction on extortion or attempted extortion by nonviolent threat, see Instruction 8.142A (Hobbs Act-Extortion or Attempted Extortion by Nonviolent Threat).

For a definition of "affecting interstate commerce," see Instruction 8.143B (Hobbs Act-Affecting Interstate Commerce).

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. United States v. Lynch, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise from either direct or indirect effects on interstate commerce. Id. at 909-10. When the effects are only indirect it may be appropriate to measure the adequacy of proof of interstate nexus by applying the test articulated in United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994).

"Property" under the Hobbs Act is not limited to tangible things; it includes the right to make business decisions and to solicit business free from coercion. United States v. Hoelker, 765 F.2d 1422, 1425 (9th Cir. 1985) (citing United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980)). The Hobbs Act is not limited to lawful property and includes contraband. United States v. Cortes, 732 F.3d 1078, 1093 (9th Cir. 2013).

Actual or threatened force standing alone does not violate the statute. "We conclude that Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion (and related attempts or conspiracies)." Scheidler v. Nat'l Org. for Women, Inc. 547 U.S. 9, 23 (2006).

A defendant's claim of right to the property is not a defense. "'Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force . . . regardless of the defendant's claim of right to the property . . . .'" United States v. Daane, 475 F.3d 1114, 1120 (9th Cir. 2007) (quoting with approval from United States v. Zappola, 677 F.2d 264, 268-69 (2d Cir. 1982)). There is an exception to this proposition, but it is confined to cases involving certain types of labor union activity. Id. at 1119-20.

The bracketed language stating ~~a fourth~~an additional element applies ~~to attempt to engage in extortion~~ only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~force.~~

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).

~~"Like their common law antecedents, federal inchoate offenses require that an actor take some step to manifest his bad intent or purpose. Take, for instance, the law of criminal attempt. 'As was true at common law the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct,' i.e., 'an overt act qualifying as a substantial step.'" United States v. $11,500.00 in United States Currency, 869 F.3d 1062, 1072 (9th Cir. 2017) (citing United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007)).~~

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.142A HOBBS ACT-EXTORTION OR ATTEMPTED EXTORTION BY NONVIOLENT THREAT (18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion by threat of [economic harm] [specify other nonviolent harm] in violation of Section 1951 of Title 18 of the United States Code. In order 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 [[induced] [intended to induce]] [name of victim] to part with property by wrongful threat of [economic harm] [specify other nonviolent harm];

Second, the defendant acted with the intent to obtain property;

Third, commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

A threat is wrongful [if it is unlawful] [or] [if the defendant knew [he] [she] was not entitled to obtain the property].

Comment

See generally Comment to Instruction 8.142 (Hobbs Act-Extortion or Attempted Extortion by Force).

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened . . . fear" (emphasis added)); United States v. Villalobos,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by unlawful means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of right to the property demanded. Id. at 957-58. For example, threats to cooperate with, or alternatively, impede an ongoing investigation, contingent on payment, are unlawful and therefore clearly wrongful. Id.

A nonviolent threat is prohibited by the Hobbs Act if it is "wrongful." 18 U.S.C. § 1951(b)(2) (defining extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened . . . fear" (emphasis added)); United States v. Villalobos,748 F.3d 953 (9th Cir. 2014) (error for jury instruction to essentially read out § 1951's "wrongful" element).

If a nonviolent threat is to be carried out by unlawful means, then the Hobbs Act's "wrongful" requirement is satisfied, regardless of whether the defendant had a lawful claim of right to the property demanded. Id. at 957-58. For example, a defendant's threat to cooperate with, or alternatively, impede an ongoing investigation, contingent upon payment are unlawful and therefore clearly wrongful. Id.

If, on the other hand, a nonviolent threat is to be carried out by lawful means (for example, a threat of economic harm), a claim of right instruction is necessary. See United States v. Dischner, 974 F.2d 1502, 1515 (9th Cir. 1992) (holding that wrongfully obtaining property by threat of economic harm is sufficient to convict of extortion under Hobbs Act and noting that "[o]btaining property is generally 'wrongful' if the alleged extortionist has no lawful claim to that property" (citing United States v. Enmons, 410 U.S. 396, 400 (1973))), overruled on other grounds by United States v. Morales, 108 F.3d 1031 (9th Cir. 1997).

It is unclear whether the claim of right instruction to be given in lawful-threat cases must require that the defendant knew he or she was not entitled to obtain the property. At least one other circuit so requires, see United States v. Sturm, 870 F.2d 769, 773-74 (1st Cir. 1989), but the Ninth Circuit has yet to impose such a requirement. See United States v. Greer, 640 F.3d 1011, 1019 n.4 (9th Cir. 2011) ("Because the district court's instructions satisfied the First Circuit's requirement in Sturm, we need not decide whether to adopt Sturm as the law of this circuit."); Dischner, 974 F.2d at 1515 (declining to "decide whether the government must prove that the defendant knew he had no entitlement" to property because district court's jury instructions necessarily required such finding). Until the Ninth Circuit decides the question, the Committee recommends the above instruction, which requires the government to prove that the defendant knew he or she was not entitled to obtain the property.

A general instruction that the defendant need not have known that his or her conduct was unlawful does not negate the instruction in lawful-threat cases that a threat is wrongful if the defendant knew he or she was not entitled to obtain the property. Knowledge that one has no entitlement to property is distinguishable from knowledge that an act violates the Hobbs Act. Greer, 640 F.3d at 1019-20.

The bracketed language stating ~~a fourth~~an additional element applies ~~to~~only when the charge is an attempt~~ to engage in extortion~~. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~nonviolent threat.~~

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).

~~Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.143 HOBBS ACT-EXTORTION OR
ATTEMPTED EXTORTION UNDER COLOR OF
OFFICIAL RIGHT
(18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] extortion under color of official right in violation of Section 1951 of Title 18 of the United States Code. In order 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 was a public official;

Second, the defendant [[obtained] [intended to obtain]] [specify property] that the defendant knew [he] [she] was not entitled to receive;

[Third, the defendant knew that the [specify property] [[was] [would be]] given in return for [taking] [withholding] some official action; [and]]

or

[Third, the defendant knew that the [specify property] [[was] [would be]] given in return for an express promise to perform a particular official action; and]

Fourth, commerce or the movement of an article or commodity in commerce from one state to another [was] [would have been] affected in some way[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

[The acceptance by a public official of a campaign contribution does not, in itself, constitute a violation of law even though the donor has business pending before the official. However, if a public official demands or accepts [money] [property] [some valuable right] in exchange for a specific requested exercise of official power, such a demand or acceptance does constitute a violation regardless of whether the payment is made in the form of a campaign contribution.]

Comment

If the defendant is not a public official, then this instruction should be modified to include a requirement that the government prove that the defendant either conspired with a public official or aided and abetted a public official. United States v. McFall, 558 F.3d 951, 960 (9th Cir. 2009). A Hobbs Act conspiracy may exist even if some members of the conspiracy are not public officials and thus cannot complete the offense. Ocasio v. United States, 136 S.Ct. 1423, 1429-32 (2016). The object of the conspiracy need not be to get property from a person outside the conspiracy; it is sufficient that the property comes from another member of the conspiracy. Id. at 1434-35.

If there is any question in the case about the "official" character of the action sought by the defendant, give Instruction 8.11A (Official Action-Defined). When using that instruction in connection with Instruction 8.143, the court should change the term "official act" to "official action."

When the property is not a campaign contribution, the government need only show that the public official obtained payment to which he or she was not entitled knowing that the payment was made in exchange for some official act. See United States v. Kincaid-Chauncey, 556 F.3d 923, 937-38 (9th Cir. 2009). In such a case the first version of the third element should be used and the final paragraph should not be included.

The second version of the third element, and the final paragraph should be included in cases involving an alleged campaign contribution. See McCormick v. United States, 500 U.S. 257 (1991); Kincaid-Chauncey, 556 F.3d at 936. The express promise need not actually be carried out. It is sufficient if the promise to act is given in exchange for the property. See Evans v. United States, 504 U.S. 255, 267 (1992).

The bracketed language stating a fifth element applies ~~to~~only when the charge is an attempt~~ to engage~~. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof~~extortion under color~~ of ~~official right.~~ 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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.143A HOBBS ACT-ROBBERY OR ATTEMPTED ROBBERY
(18 U.S.C. § 1951)

The defendant is charged in [Count _____ of] the indictment with [attempted] robbery in violation of Section 1951 of Title 18 of the United States Code. In order 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 knowingly [obtained] [attempted to obtain] money or property from or in the presence of [name of victim];

Second, the defendant [did so] [attempted to do so] by means of robbery;

Third, the defendant believed that [name of victim] [parted] [would part] with the money or property because of the robbery; [and]

Fourth, the robbery [affected] [would have affected] interstate commerce[; and][.]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

"Robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or to property in his custody or possession, or to the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining].

Comment

Give the bracketed language appropriate to either a completed crime or an attempt. Only that portion of the definition of robbery that is relevant to the issues in the trial should be given to the jury.

Only a de minimis effect on interstate commerce is required to establish jurisdiction under the Hobbs Act, and the effect need only be probable or potential, not actual. United States v. Lynch, 437 F.3d 902, 908-09 (9th Cir. 2006) (en banc). The interstate nexus may arise from either direct or indirect effects on interstate commerce. Id. at 909-10. When the effects are only indirect it may be appropriate to measure the

adequacy of proof of interstate nexus by applying the test articulated in United States v. Collins, 40 F.3d 95, 100 (5th Cir. 1994).

For a definition of "affecting interstate commerce," see Instruction 8.143B (Hobbs Act-Affecting Interstate Commerce).

When the defendant has been charged with robbing or attempting to rob a drug dealer, the government satisfies the "affecting commerce" element of this crime if it shows that the defendant robbed or attempted to rob a drug dealer of drugs or drug proceeds. Taylor v. United States, 136 S. Ct. 2074 (2016). "[T]he Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines." Id. at 2081.

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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~~"Like their common law antecedents, federal inchoate offenses require that an actor take some step to manifest his bad intent or purpose. Take, for instance, the law of criminal attempt. 'As was true at common law, the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct,' i.e. 'an overt act qualifying as a substantial step.'" United States v. $11,500.00 in United States Currency, 869 F.3d 1062, 1072 (9th Cir. 2017) (citing United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007)).~~

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

. 2003).

Approved ~~3/2018~~1/2019

8.144 TRAVEL ACT-INTERSTATE OR FOREIGN TRAVEL
IN AID OF RACKETEERING ENTERPRISE
(18 U.S.C. § 1952(a)(3))

The defendant is charged in [Count _____ of] the indictment with violating Section 1952(a)(3) of Title 18 of the United States Code. In order 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 [traveled in interstate or foreign commerce] [used the mail] [[used [specify facility] in interstate or foreign commerce]] with the intent to [promote, manage, establish, or carry on] [facilitate the promotion, management, establishment, or carrying on of] [specify unlawful activity]; and

Second, after doing so the defendant [[performed [specify act]] [[attempted to perform [specify act]][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

~~The bracketed language stating a third element applies only when the charge is an attempt. 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).~~

In United States v. Nader, 542 F.3d 713, 722 (9th Cir. 2008), the Ninth Circuit held that telephone calls that were entirely intrastate in nature and were made on a facility in interstate commerce, were adequate to support the conviction.

In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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 ~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("A conviction for attempt requires proof of culpable intent and conduct constituting~~ a substantial step toward the commission of ~~the~~a crime ~~that strongly corroborates that intent") and~~. United States v. ~~Darby, 857~~ Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).

"[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.~~2d 623, 625~~3d 914, 921 (9th Cir. ~~1988) (same).~~2003).

Approved ~~3/2018~~1/2019

8.146 FINANCIAL TRANSACTION OR ATTEMPTED TRANSACTION TO PROMOTE UNLAWFUL ACTIVITY
(18 U.S.C. § 1956(a)(1)(A))

The defendant is charged in [Count _____ of] the indictment with [conducting] [attempting to conduct] a financial transaction to promote [unlawful activity] in violation of Section 1956(a)(1)(A) of Title 18 of the United States Code. In order 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 [conducted] [intended to conduct] a financial transaction involving property that represented the proceeds of [specify prior, separate criminal activity];

Second, the defendant knew that the property represented the proceeds of [specify prior, separate criminal activity]; [and]

Third, the defendant acted with the intent to promote the carrying on of [specify unlawful activity being promoted][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

A financial transaction is a transaction involving [the movement of funds by wire or other means that] [one or more monetary instruments that] [the use of a financial institution that is engaged in, or the activities of which] affect[s] interstate or foreign commerce in any way.

Comment

See United States v. Sayakhom, 186 F.3d 928, 940 (9th Cir. 1999), approving a similar version of this instruction.

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618). For cases involving conduct prior to May 20, 2009, consider United States v. Santos, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is gambling, the term "proceeds" must be defined as "profits."), and United States v. Van Alstyne, 584 F.3d 803, 814 (9th Cir. 2009) ("We

therefore view the holding that commanded five votes in Santos as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in Santos.").

With respect to the second element, the government must prove that the defendant knew that the property represented the proceeds of the specific prior, separate criminal activity but need not prove that the defendant knew that the act of laundering the proceeds was unlawful. See United States v. Deeb, 175 F.3d 1163, 1167 (9th Cir. 1999).

Because it is a specific intent crime, it is reversible error to give Instruction 5.7 (Knowingly-Defined) in a money laundering case. United States v. Stein, 37 F.3d 1407, 1410 (9th Cir. 1994). See also United States v. Turman, 122 F.3d 1167, 1170 (9th Cir. 1997) (applying Stein retroactively).

~~The bracketed language stating a fourth element applies to~~In attempt ~~to engage in~~ cases, "[t]o constitute a substantial step, a ~~financial transaction to promote unlawful activity. For an attempt to commit~~ 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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~~

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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~

~~_____~~1/2019

8.147 LAUNDERING OR ATTEMPTING TO LAUNDER MONETARY INSTRUMENTS
(18 U.S.C. § 1956(a)(1)(B))

The defendant is charged in [Count _____ of] the indictment with [laundering] [attempting to launder] money in violation of Section 1956(a)(1)(B) of Title 18 of the United States Code. In order 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 [conducted] [intended to conduct] a financial transaction involving property that represented the proceeds of [specify prior, separate criminal activity];

Second, the defendant knew that the property represented the proceeds of some form of unlawful activity; and

Third, the defendant knew that the transaction was designed in whole or in part [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds] [to avoid a transaction reporting requirement under state or federal law][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

A financial transaction is a transaction involving [the movement of funds by wire or other means that] [one or more monetary instruments that] [the use of a financial institution that is engaged in, or the activities of which] affect[s] interstate or foreign commerce in any way.

The phrase "knew that the property represented the proceeds of some form of unlawful activity" means that the defendant knew that the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony. I instruct you that [specify relevant unlawful activity] is a felony.

[The laws of the [United States] [State of _____] require the reporting of [specify reporting requirement].]

Comment

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618).

For cases involving conduct prior to May 20, 2009, consider United States v. Santos, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is gambling, the term "proceeds" must be defined as "profits."), and United States v. Van Alstyne, 584 F.3d 803, 814 (9th Cir. 2009) ("We therefore view the holding that commanded five votes in Santos as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in Santos."). See also United States v. Webster, 623 F.3d 901, 906 (9th Cir. 2010) (reading Santos as holding that where a money laundering count is based on transfers among co-conspirators of money from the sale of drugs, "proceeds" includes all "receipts" from such sales).

If the defendant is charged with laundering a monetary instrument other than cash, see 18 U.S.C. § 1956(c)(5), the instruction should be modified accordingly.

Because it is a specific intent crime, it is reversible error to give Instruction 5.7 (Knowingly-Defined) in a money laundering case. United States v. Stein, 37 F.3d 1407, 1410 (9th Cir. 1994). See also United States v. Turman, 122 F.3d 1167, 1169 (9th Cir. 1997) (applying Stein retroactively).

The government is required to prove "that the defendant knew that the underlying acts which provided the sources of the laundered proceeds were illegal," but not that "the defendant knew that his money-laundering acts were illegal." United States v. Golb, 69 F.3d 1417, 1428 (9th Cir. 1999).

With respect to the third element of the instruction, see Cuellar v. United States, 553 U.S. 550, 561-68 (2008) (evidence of how money was moved insufficient to prove knowledge); see also United States v. Wilkes, 662 F.3d 524, 547 (9th Cir. 2011) (evidence that defendant's transactions were "convoluted" rather than "simple transactions that can be followed with relative ease, or transactions that involve nothing but the initial crime," was sufficient to prove a transaction designed to conceal) (citation omitted).

~~The bracketed language stating a fourth element applies to attempt to launder monetary investments. 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).~~

The bracketed language regarding reporting requirements in the last paragraph of the instruction only applies if the defendant is charged with

laundering funds in order to avoid a transaction reporting requirement under state or federal law.

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~

~~———~~1/2019

8.148 TRANSPORTING OR ATTEMPTING TO TRANSPORT FUNDS TO PROMOTE UNLAWFUL ACTIVITY
~~———~~(18 U.S.C. § 1956(a)(2)(A))

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] funds to promote unlawful activity in violation of Section 1956(a)(2)(A) of Title 18 of the United States Code. In order 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 [transported] [intended to transport] money [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States]; [and]

Second, the defendant acted with the intent to promote the carrying on of [specify criminal activity charged in the indictment][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

The bracketed language stating ~~a third~~an additional element applies ~~to~~only when the charge is an attempt~~ to transport funds to promote unlawful activity.~~

~~For an~~. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~to commit the crime, jurors~~

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).

"[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~~ The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~. 2003).

Approved ~~3/2018~~

~~———~~1/2019

8.149 TRANSPORTING OR ATTEMPTING TO TRANSPORT MONETARY INSTRUMENTS FOR THE PURPOSE OF LAUNDERING
(18 U.S.C. § 1956(a)(2)(B))

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] money for the purpose of laundering in violation of Section 1956(a)(2)(B) of Title 18 of the United States Code. In order 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 [transported] [intended to transport] money [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States];

Second, the defendant knew that the money represented the proceeds of [specify prior, separate criminal activity]; [and]

Third, the defendant knew the transportation was designed in whole or in part [to conceal or disguise the [nature] [location] [source] [ownership] [control] of the proceeds of [specify criminal activity charged in the indictment]] [to avoid a transaction reporting requirement under state or federal law][.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime of transporting money for the purpose of laundering. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

[The laws of the [United States] [State of _____] require the reporting of [reporting requirement].]

Comment

For cases involving conduct on or after May 20, 2009, "proceeds" means "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9) (subsection (c)(9) was added by Pub. L. 111-21, 123 Stat. 1618).

For cases involving conduct prior to May 20, 2009, consider United States v. Santos, 553 U.S. 507, 513-14 (2008) (plurality opinion) (Where the prior, separate criminal activity is gambling, the term "proceeds"

must be defined as "profits."), and United States v. Van Alstyne, 584 F.3d 803, 814 (9th Cir. 2009) ("We therefore view the holding that commanded five votes in Santos as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the plurality and concurrence in Santos."). See also United States v. Phillips, 704 F.3d 754 (9th Cir. 2012) (when money laundering activity did not further predicate criminal scheme or occur during normal course of running scheme, "proceeds" were correctly defined as "gross receipts" under 18 U.S.C. § 1957); United States v. Webster, 623 F.3d 901, 906 (9th Cir. 2010) (reading Santos as holding that when money laundering count is based on transfers among co-conspirators of money from sale of drugs, "proceeds" includes all "receipts" from such sales).

Because it is a specific intent crime, it is reversible error to give Instruction 5.7 (Knowingly-Defined) in a money laundering case. United States v. Stein, 37 F.3d 1407, 1410 (9th Cir. 1994). See also United States v. Turman, 122 F.3d 1167, 1169 (9th Cir. 1997) (applying Stein retroactively).

The elements of this instruction follow the language of the statute, although in most cases the crime described in each element would be the same. See United States v. Jenkins, 633 F.3d 788, 806-07 (9th Cir. 2011).

With respect to the second element of the instruction, the government must prove that the defendant knew that the property represented the proceeds of the specific prior, separate criminal activity but need not prove that the defendant knew that the act of laundering the proceeds was unlawful. See United States v. Deeb, 175 F.3d 1163, 1167 (9th Cir. 1999).

With respect to the third element of the instruction, see Cuellar v. United States, 553 U.S. 550, 561-68 (2008) (evidence of how money was moved insufficient to prove knowledge).

The bracketed language stating ~~a fourth~~an additional element applies ~~to~~only when the charge is an attempt~~ to transport monetary instruments for the purpose of laundering.~~

~~For an~~. In attempt ~~to commit~~cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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~~

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).

"[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~~ The "strongly corroborates" language is taken from United States v.~~. 2003).

~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.151 VIOLENT CRIME OR ATTEMPTED VIOLENT CRIME IN AID OF RACKETEERING ENTERPRISE (18 U.S.C. § 1959)

The defendant is charged in Count _____ of the indictment with [committing] [threatening to commit] [attempting to commit] [conspiring to commit] a crime of violence, specifically, [specify crime of violence] in aid of a racketeering enterprise in violation of Section 1959 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, on or about the time period described in Count _____, an enterprise affecting interstate commerce existed;

Second, the enterprise engaged in racketeering activity;

Third, the defendant [committed] [threatened to commit] [attempted to commit] [conspired to commit] the following crime of violence: [specify crime of violence] as defined in [specify jury instruction stating all elements of predicate crime of violence]; [and]

Fourth, ~~that~~ the defendant's purpose in [[committing] [threatening to commit] [attempting to commit] [conspiring to commit]] [specify crime of violence] was to gain entrance to, or to maintain, or to increase [his] [her] position in the enterprise[.] [and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

Use this instruction in conjunction with Instructions 8.152 (Racketeering Enterprise-Enterprise Affecting Interstate Commerce-Defined), 8.153 (Racketeering Activity-Defined), 8.154 (Racketeering Enterprise-Proof of Purpose); and an instruction setting forth the elements of the predicate crime of violence. When the charge alleges an attempt or conspiracy to commit a crime of violence, include an appropriate instruction as to attempt or conspiracy. See Instruction 5.3 (Attempt) and Instruction 8.20 (Conspiracy-Elements).

In United States v. Banks, 514 F.3d 959, 964 (9th Cir. 2008), the Ninth Circuit summarized existing case law that identified the four

elements necessary for a conviction of committing violent crimes in aid of racketeering activity (VICAR):

The VICAR statute provides that '[w]hoever, . .. for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders [or] . . . assaults with a dangerous weapon . . . in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished.' 18 U.S.C. § 1959(a) (emphasis added). In our prior decisions we have identified four elements required for a conviction under this statute: '(1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendant[ ] committed a violent crime; and (4) that [the defendant] acted for the purpose of promoting [his] position in a racketeering enterprise.' United States v. Bracy, 67 F.3d 1421, 1429 (9th Cir. 1995); see also United States v. Fernandez, 388 F.3d 1199, 1220 (9th Cir. 2004).

In United States v. Houston, 648 F.3d 806, 819-20 (9th Cir. 2011), the Ninth Circuit held it was not error to refuse to instruct on second degree murder as a lesser predicate to VICAR first degree murder.

A charge under Section 1959 also applies to violent crimes committed "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity." If that is the basis of the charged crime, the fourth element of the instruction should be modified accordingly. See United States v. Concepcion, 983 F.2d 369, 384 (2d Cir. 1992) (Section 1959 is sufficiently inclusive to encompass actions of an "independent contractor," as it reaches not only those who seek to maintain or increase their positions within a RICO enterprise, but also those who perform violent crimes as consideration for the receipt of anything of pecuniary value from such an enterprise).

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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~~ The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

2003).

Approved ~~3/2018~~

1/2019

8.154 RACKETEERING ENTERPRISE-PROOF OF PURPOSE
(18 U.S.C. § 1959)

With respect to the fourth element in Instruction _____ [insert cross reference to pertinent instruction, e.g. Instruction 8.151], the government must prove beyond a reasonable doubt that the defendant's purpose was to gain entrance to, or to maintain, or to increase [his] [her] position in the enterprise.

It is not necessary for the government to prove that this motive was the sole purpose, or even the primary purpose of the defendant in committing the charged crime. You need only find that enhancing [his] [her] status in [name of enterprise] was a substantial purpose of the defendant or that [he] [she] committed the charged crime as an integral aspect of membership in [name of enterprise].

In determining the defendant's purpose in committing the alleged crime, you must determine what [he] [she] had in mind. Since you cannot look into a person's mind, you have to determine purpose by considering all the facts and circumstances before you.

Comment

Use this instruction in conjunction with Instructions 8.151 (Violent Crime in Aid of Racketeering Enterprise), 8.152 (Racketeering Enterprise-Enterprise Affecting Interstate Commerce-Defined), and 8.153 (Racketeering Activity-Defined). See Comment to Instruction 8.151. If the fourth element of Instruction 8.151 is modified, this instruction should also be modified.

"[T]he purpose element is met if 'the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership.'" United States v. Banks, 514 F.3d 959, 965 (9th Cir. 2008) (quoting United States v. Pimentel, 346 F.3d 285, 295-96 (2d Cir. 2003)).

"VICAR's purpose element is satisfied even if the maintenance or enhancement of his position in the criminal enterprise was not the defendant's sole or principal purpose." Banks, 514 F.3d at 965. The law, however, requires a defendant's purpose be "more than merely incidental." Id. at 969. Although the gang or racketeering enterprise purpose does not have to be "the only purpose or the main purpose" of a murder or assault, it does have to be a substantial purpose. Id. at 970. "Murder while a gang member is not necessarily a murder for the purpose of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang." Id.

The Ninth Circuit held that it was not error to instruct on an alternate Pinkerton theory (co-conspirator's liability), even though under Pinkerton it is not necessary that the defendant personally act for the purpose of maintaining his position in the enterprise provided that he had

that intent when he joined the conspiracy. United States v. Houston, 648 F.3d 806, 818-19 (9th Cir. 2011).

In United States v. Smith, 831 F.3d 1207, 1217-18 (9th Cir. 2016), the Ninth Circuit considered whether it was error for the lower court to state that the purpose "must be more than merely incidental." The Smith Court noted this phrasing could imply the standard was too low, which could result in error. Id. at 1219. The Court noted, however, that the instruction should not use the word dominant because it "has a flavor" "suggest[ing] that the standard is very high." Id. Ultimately the court declined to weigh on which word should be used but said "substantial" "would convey the idea with more precision." Id.

Approved 1/2019

8.157 RICO-PATTERN OF RACKETEERING ACTIVITY
(18 U.S.C. § 1961(5))

To establish a pattern of racketeering activity, the government must prove each of the following beyond a reasonable doubt:

First, at least two acts of racketeering were committed~~,~~ within a period of ten years of each other;

Second, the acts of racketeering ~~had~~were related to each other, meaning that there was a relationship ~~to each other which~~between or among the acts of racketeering; and

Third, the acts of racketeering amounted to or posed a threat of continued criminal activity~~; and~~

~~Third,~~.

With respect to the second element, acts of racketeering are related if they embraced the same or similar purposes, results, participants, victims, or methods of commission, or were otherwise interrelated by distinguishing characteristics.

Sporadic, widely separated, or isolated criminal acts do not form a pattern of racketeering activity.

Two racketeering acts are not necessarily enough to establish a pattern of racketeering activity.

Comment

~~If there is an issue whether there were two racketeering activities within ten years, the instruction should be modified by inserting "within a period of ten years" after "acts of racketeering were committed" at the end of the first element.~~

In determining whether two racketeering activities occurred within ten years, any period of imprisonment after the commission of a prior act must be excluded.

See United States v. Camez, 839 F.3d 871, 876 (9th Cir. 2016) (pattern of racketeering activity requires at least two predicate acts, one of which may have occurred while defendant was minor if criminal conduct in issue continued past age of majority); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985) (although at least two acts are necessary under the definition of "pattern of racketeering activity," two acts may not be sufficient to constitute a pattern). See also H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989) (pattern of racketeering activity requires a "showing that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity"); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535-36 (9th Cir. 1992) (applying Northwestern Bell); Ikuno v. Yip, 912 F.2d 306, 309 (9th Cir. 1990) (same).

Approved ~~12/2016~~1/2019

8.160 RICO-CONDUCTING AFFAIRS OF COMMERCIAL ENTERPRISE OR UNION
(18 U.S.C. § 1962(c))

The defendant is charged in [Count _____ of] the indictment with having [conducted] [participated in the conduct of] the affairs of [specify enterprise or union] through a pattern of racketeering activity in violation of Section 1962(c) of Title 18 of the United States Code. In order 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 was employed by or associated with [specify enterprise or union];

Second, the defendant [conducted] [participated, directly or indirectly, in the conduct of] the affairs of [specify enterprise or union] through a pattern of racketeering activity or collection of unlawful debt. To conduct or participate means that the defendant had to be involved in the operation or management of the [specify enterprise or union]; and

Third, [specify enterprise or union] engaged in or its activities in some way affected commerce between one state and [an]other state[s], or the United States and a foreign country.

Comment

When racketeering acts are charged as separate counts in the indictment, use this instruction in combination with Instructions 8.155 (RICO-Racketeering Act-Charged as Separate Count in Indictment) and 8.157 (RICO-Pattern of Racketeering Activity). When the racketeering acts are not charged as separate counts in the indictment, use this instruction in combination with Instructions 8.156 (RICO-Racketeering Act-Not Charged as Separate Count in the Indictment) and 8.157 (RICO-Pattern of Racketeering Activity).

As defined in 18 U.S.C. § 1961(4), an enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union"; therefore, the name of the legal entity should be used.

The enterprise cannot also be the RICO defendant when the charge is that the defendant violated 18 U.S.C. § 1962(c).

See United States v. Shryock, 342 F.3d 948, 985-86 (9th Cir. 2003) (defining "conducts or participates" in the affairs of the enterprise).

See Reves v. Ernst & Young, 507 U.S. 170, 184 (1993) (holding that liability under section 1962 may also extend to lower rung participants who are under the direction of upper management).

Approved 1/2019

8.163 ATTEMPTED BANK ROBBERY
(18 U.S.C. § 2113)

The defendant is charged in [Count _____ of] the indictment with attempted bank robbery in violation of Section 2113 of Title 18 of the United States Code. In order 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 intended to use force and violence or intimidation to take money that belonged to [specify financial institution];

Second, the deposits of [specify financial institution] were then insured by the [Federal Deposit Insurance Corporation] [National Credit Union Administration Board]; and

Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward the committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of the 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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~~—~~

~~The "strongly corroborates" language is taken from United States v.~~. 2003).

~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~
1/2019

8.165 ATTEMPTED AGGRAVATED SEXUAL ABUSE
(18 U.S.C. § 2241(a))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse in violation of Section 2241(a) of Title 18 of the United States Code. In order 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 intended to [use force] [threaten or place [name of victim] in fear that some person would be subjected to death, serious bodily injury, or kidnapping] to cause [name of victim] to engage in a sexual act;

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime; and

Third, the offense was committed at [specify place of federal jurisdiction].

In this case, "sexual act" means [specify statutory definition].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the penultimate paragraph of the instruction.

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~ , a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v.~~

"[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).
~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.167 ATTEMPTED AGGRAVATED SEXUAL ABUSE-ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE
(18 U.S.C. § 2241(b)(2))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse in violation of Section 2241(b)(2) of Title 18 of the United States Code. In order 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 intended to engage in a sexual act with [name of victim] after substantially impairing [name of victim]'s ability to judge or control conduct by administering a drug, intoxicant or other similar substance either by force or threat of force or without the knowledge or permission of [name of victim];

Second, the defendant did something that was a substantial step toward committing the crime of aggravated sexual abuse and that strongly corroborated the defendant's intent to commit that crime; and

Third, the offense was committed at [specify place of federal jurisdiction].

In this case, "sexual act" means [specify statutory definition].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~ , a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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. ~~Hofus, 598~~Rivera-Relle, 333 F.3d ~~1171, 1176~~914, 921 (9th Cir. ~~2010).~~

~~The "strongly corroborates" language is taken from United States v.~~2003). ~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.168 AGGRAVATED SEXUAL ABUSE
OF CHILD
(18 U.S.C. § 2241(c))

The defendant is charged in [Count _____ of] the indictment with aggravated sexual abuse of a child in violation of Section 2241(c) of Title 18 of the United States Code. In order 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 knowingly engaged in a sexual act with [name of victim];

Second, at the time, [name of victim] was under the age of twelve years; and

Third, [the defendant crossed a state line with the intent to engage in a sexual act with a person who was under the age of twelve years] [the offense was committed at [specify place of federal jurisdiction]].

The government need not prove that the defendant knew that the other person engaging in the sexual act was under the age of twelve years.

In this case, "sexual act" means [specify statutory definition].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

The Ninth Circuit, analyzing the mandatory life sentencing enhancement under the last sentence of the statute, has held that a conviction under § 2241(c) "depend[s] on the commission of a 'sexual act.'" United States v. Etimani, 328 F.3d 493, 503 (9th Cir. 2003) (defining sexual act as "skin-to-skin touching" and finding that sentencing enhancement did not apply where previous conviction was pursuant to statute allowing conviction for touching over clothes).

Although the Committee has not found any Ninth Circuit case explicitly holding that proof of a sexual act is an element of the offense under the first clause of 18 U.S.C. § 2241(c), the court, when analyzing the mandatory life sentencing enhancement under the last sentence of the statute, stated a conviction under § 2241(c) "depend[s] on the commission of a 'sexual act.'" (defining sexual act as "skin-to-skin touching"). United States v. Etimani, 328 F.3d 493, 503 (9th Cir. 2003).

See 18 U.S.C. § 2241(d), as to the penultimate paragraph of the instruction. See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

An alleged mistake as to the victim's age is not a defense to a charge of aggravated sexual abuse under a statute prohibiting anyone from knowingly engaging in sexual contact with another person who has not

attained the age of 12 years. United States v. Juvenile Male, 211 F.3d 1169, 1171 (9th Cir. 2000).

Approved 1/2019

8.169 ATTEMPTED AGGRAVATED SEXUAL ABUSE OF CHILD
(18 U.S.C. § 2241(c))

The defendant is charged in [Count _____ of] the indictment with attempted aggravated sexual abuse of a child in violation of Section 2241(c) of Title 18 of the United States Code. In order 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 intended to engage in a sexual act with [name of victim];

Second, [name of victim] was under the age of twelve years;

Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime; and

Fourth, [the defendant crossed a state line with the intent to engage in a sexual act with a person who was under the age of twelve years] [the offense was committed at [specify place of federal jurisdiction]].

The government need not prove that the defendant knew that the other person with whom the defendant intended to engage in a sexual act was under the age of twelve years.

In this case, "sexual act" means [specify statutory definition].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

~~Although the Committee has not found any~~The Ninth Circuit ~~case explicitly holding that proof of a sexual act is an element of the offense under the first clause of 18 U.S.C. § 2241(c), the court, when~~, analyzing the mandatory life sentencing enhancement under the last sentence of the statute, ~~stated~~has held that a conviction under § 2241(c) "depend[s] on the commission of a 'sexual act.'" ~~(defining sexual act as "skin-to-skin touching").~~ United States v. Etimani, 328 F.3d 493, 503 (9th Cir. 2003~~).~~) (defining sexual act as "skin-to-skin touching" and finding that sentencing enhancement did not apply where previous conviction was pursuant to statute allowing conviction for touching over clothes).

See 18 U.S.C. § 2241(d), as to the sixth paragraph of the instruction. See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the seventh paragraph of the instruction.

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~, a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.171 ATTEMPTED SEXUAL ABUSE-
BY THREAT
(18 U.S.C. § 2242(1))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse in violation of Section 2242(1) of Title 18 of the United States Code. In order 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 intended to cause [name of victim] to engage in a sexual act by threatening or placing [name of victim] in fear;

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse and that strongly corroborated the defendant's intent to commit that crime; and

Third, the offense was committed at [specify place of federal jurisdiction].

In this case, "sexual act" means [specify statutory definition].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~, a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007~~). ~~~~) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.172 SEXUAL ABUSE-INCAPACITY OF VICTIM
(18 U.S.C. § 2242(2))

The defendant is charged in [Count _____ of] the indictment with sexual abuse in violation of Section 2242(2) of Title 18 of the United States Code. In order 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 knowingly engaged in a sexual act with [name of victim];

Second, [name of victim] was [incapable of appraising the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act]; and

Third, the offense was committed at [specify place of federal jurisdiction].

In this case, "sexual act" means [specify statutory definition].

[A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in sexual act.]

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

For purposes of a charge under § 2242(2)(B), establishing that a victim was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act does not require proof that the victim was "physically helpless." U.S. v. James, 810 F.3d 674, 679 (9th Cir. 2016).

Approved 1/2019

8.173 ATTEMPTED SEXUAL ABUSE-
INCAPACITY OF VICTIM
(18 U.S.C. § 2242(2))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse in violation of Section 2242(2) of Title 18 of the United States Code. In order 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 intended to engage in a sexual act with a person who was [incapable of appraising the nature of the conduct] [physically incapable of declining participation in or communicating unwillingness to engage in that sexual act];

Second, the defendant did something that was a substantial step toward committing the crime of sexual abuse and that strongly corroborated the defendant's intent to commit that crime; and

Third, the offense was committed at [specify place of federal jurisdiction].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

In this case, "sexual act" means [specify statutory definition].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~ , a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v.~~

"[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).
~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.175 ATTEMPTED SEXUAL ABUSE OF MINOR
(18 U.S.C. § 2243(a))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse of a minor in violation of Section 2243(a) of Title 18 of the United States Code. In order 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 intended to engage in a sexual act with [name of victim], who had reached the age of twelve years but had not reached the age of sixteen years;

Second, [name of victim] was at least four years younger than the defendant;

Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime; and

Fourth, the offense was committed at [specify place of federal jurisdiction].

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

The government need not prove that the defendant knew the age of [name of victim] or that the defendant knew that [name of victim] was at least four years younger than the defendant.

In this case, "sexual act" means [specify statutory definition].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

See 18 U.S.C. § 2243(d), as to the penultimate paragraph of the instruction. See 18 U.S.C. § 2246(2) for the definition of sexual act referred to in the last paragraph of the instruction.

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~ , a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose~~

~~charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

~~The "strongly corroborates" language is taken from~~ "[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. ~~Snell, 627~~Rivera-Relle, 333 F.~~2d 186, 187~~3d 914, 921 (9th Cir. ~~1980) ("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~~2003). ~~United States v. Darby, 857 F.2d 623, 625 (9th Cir. 1988) (same).~~

Approved ~~3/2018~~1/2019

8.177 ATTEMPTED SEXUAL ABUSE OF

PERSON IN OFFICIAL DETENTION
(18 U.S.C. § 2243(b))

The defendant is charged in [Count _____ of] the indictment with attempted sexual abuse of a person in official detention in violation of Section 2243(b) of Title 18 of the United States Code. In order 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 intended to engage in a sexual act with [name of victim], who at the time was in official detention at [specify place of federal jurisdiction] and was under the custodial, supervisory, or disciplinary authority of the defendant; and

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

In this case, "sexual act" means [specify statutory definition].

In this case, "official detention" means [specify official detention definition].

Comment

See Comment to Instruction 8.164 (Aggravated Sexual Abuse).

"Official detention" is defined in 18 U.S.C. § 2246(5).

~~"[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.), cert. denied, 540 U.S. 977 (2003).~~

"To constitute a substantial step~~ toward the commission of a crime, the~~, a defendant's ~~conduct~~actions must ~~(1) advance the criminal purpose charged,~~cross the line between preparation and ~~(2) provide some verification of the existence of that purpose."~~attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." United States v. Goetzke, 494 F.3d 1231, ~~1235~~1237 (9th Cir. 2007~~). Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.~~) (internal quotations omitted).

~~United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

8.181 SEXUAL EXPLOITATION OF CHILD
(18 U.S.C. § 2251(a))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(a) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant

[[employed] [used] [persuaded] [coerced] [[name of victim]] to take part in sexually explicit conduct]

or

[had [name of victim] assist any other person to engage in sexually explicit conduct]

or

[transported [name of victim] [[across state lines] [in foreign commerce] [in any Territory or Possession of the United States]] with the intent that [name of victim] engage in sexually explicit conduct]

for the purpose of producing a visual depiction of such conduct; and

Third,

[the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]

or

[the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]

or

[the visual depiction was mailed or actually transported across state lines or in foreign commerce.]

In this case, "sexually explicit conduct" means [specify statutory definition].

In this case, "producing" means [specify statutory definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

Knowledge of the age of the minor victim is not an element of the offense. United States v. United States District Court, 858 F.2d 534 (9th Cir. 1988). See also United States v. X-Citement Video, Inc., 513 U.S. 64, 76 n. 5 (1994) ("[P]roducers may be convicted under § 2251(a) without proof they had knowledge of age . . ."") (dicta). But see Instruction 8.186 (Sexual Exploitation of a Child-Defense of Reasonable Belief of Age).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b). For a definition of computer, see 18 U.S.C. §§ 1030(e) and 2256(6).

See United States v McCalla, 545 F.3d 750, 753-56 (9th Cir. 2008) (applying § 2251(a) to noncommercial intrastate production did not violate the Commerce Clause; Congress had a broad interest in preventing sexual exploitation of children and it was rational that Congress would regulate intrastate production).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See United States v. Kemmish, 120 F.3d 937, 942 (9th Cir. 1997).

The term "used" in the second element of the instruction means "to put into action or service," "to avail oneself of," or "[to] employ." United States v. Laursen, 847 F.3d 1026, 1032 (9th Cir. 2017).

The third element of the instruction reflects § 2251(a)'s three alternative grounds for federal jurisdiction. Only the first of the three grounds requires a particular mental state of the defendant. The "knows or has reason to know" language from the statute's first jurisdictional clause does not impute a knowledge requirement to the other two clauses. United States v. Sheldon, 755 F.3d 1047 (9th Cir. 2014) (testimony at trial that video recorder used in Montana was manufactured in China sufficient to satisfy jurisdictional element of § 2251(a)).

Approved ~~3/2017~~1/2019

8.182 SEXUAL EXPLOITATION OF CHILD-
PERMITTING OR ASSISTING
BY PARENT OR GUARDIAN
(18 U.S.C. § 2251(b))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(b) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant was a [parent] [legal guardian] [person having custody or control] of [name of victim];

Third, the defendant knowingly permitted [name of victim] to [engage in sexually explicit conduct] [assist any other person to engage in sexually explicit conduct] for the purpose of producing a visual depiction of such conduct; and

Fourth,

[the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce.]

or

[the visual depiction was produced using materials that had been mailed, shipped, or transported across state lines or in foreign commerce.]

or

[the visual depiction was actually mailed or transported across state lines or in foreign commerce.]

The term "custody or control" includes temporary supervision over or responsibility for a minor, whether legally or illegally obtained.

In this case, "sexually explicit conduct" means [specify statutory definition].

In this case, "producing" means [specify statutory definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Custody or control" is defined in 18 U.S.C. § 2256(7).

Transportation in interstate or foreign commerce can be accomplished by any means, including by a computer. 18 U.S.C. § 2251(b). For a definition of computer, see 18 U.S.C. §§ 1030(e) and 2256(6).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See United States v. Kemmish, 120 F.3d 937, 942 (9th Cir. 1997).

Approved 1/2019

8.183 SEXUAL EXPLOITATION OF CHILD-NOTICE OR ADVERTISEMENT SEEKING OR OFFERING (18 U.S.C. § 2251(d))

The defendant is charged in [Count _____ of] the indictment with sexual exploitation of a child in violation of Section 2251(d) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, at the time, [name of victim] was under the age of eighteen years;

Second, the defendant knowingly [made] [printed] [published] [caused to be made] [caused to be printed] [caused to be published] a [notice] [advertisement];

Third, the [notice] [advertisement] [[sought] [offered]]

[to [receive] [exchange] [buy] [produce] [display] [distribute] [reproduce] any visual depiction, if the production of the visual depiction utilized [name of victim] engaging in sexually explicit conduct and such visual depiction is of such conduct; and]

or

[participation in any act of sexually explicit conduct [by] [with] [[name of victim]] for the purpose of producing a visual depiction of such conduct; and]

Fourth, the defendant knew or had reasons to know the [notice] [advertisement] would be transported across state lines or mailed, or such [notice] [advertisement] was actually transported across state lines or mailed.

In this case, "sexually explicit conduct" means [sexually explicit conduct definition].

In this case, "producing" means [producing definition].

In this case, "visual depiction" means [specify statutory definition].

Comment

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Notice" and "advertisement" are not defined in the statute, but what constitutes a notice or advertisement is a factual question, not a legal one. See United States v. Brown, 859 F.3d 730 (9th Cir. 2017) (holding Sixth Amendment violated when trial court precluded defendant from arguing that charged postings, encrypted and on closed, password-protected online bulletin board, did not constitute notice or advertisement).

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. § 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. See United States v. Kemmish, 120 F.3d 937, 942 (9th Cir. 1997).

Under 18 U.S.C. § 2251(d)(1)(A) "[t]here is no requirement that a defendant personally produce child pornography in order for criminal liability to attach." United States v. Williams, 660 F.3d 1223, 1225 (9th Cir. 2011).

Approved ~~9/2017~~1/2019

8.184 SEXUAL EXPLOITATION OF CHILD-
TRANSPORTATION OF CHILD PORNOGRAPHY
(18 U.S.C. § 2252(a)(1))

The defendant is charged in [Count _____ of] the indictment with [shipping] [transporting] child pornography in violation of Section 2252(a)(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly [transported] [shipped] a visual depiction in interstate commerce by any means, including a computer;

Second, that the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third, that such visual depiction was of a minor engaged in sexually explicit conduct;

Fourth, that the defendant knew that such visual depiction was of sexually explicit conduct; and

Fifth, the defendant knew that at least one of the persons engaged in sexually explicit conduct in such visual depiction was a minor.

Comment

"Interstate commerce" is defined by 18 U.S.C. § 10.

"Sexually explicit conduct" is defined in 18 U.S.C. § 2256(2).

"Producing" is defined in 18 U.S.C. § 2256(3).

"Visual depiction" is defined in 18 U.S.C. § 2256(5).

"Computer" is defined in 18 U.S.C. §§ 1030(e) and 2256(6).

Although the term "knowingly" in the text of 18 U.S.C. § 2252(a)(1) and (2) appears only to modify the act of transportation or shipment, the United States Supreme Court has held that the knowledge requirement also applies to the sexually explicit nature of the material as well as the minority status of the persons depicted. See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994).

Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999), sets forth a legislative history of the various federal acts dealing with child pornography.

8.186 SEXUAL EXPLOITATION OF A CHILD-
DEFENSE OF REASONABLE BELIEF OF AGE

It is a defense to a charge of sexual exploitation of a child that the defendant did not know, and could not reasonably have learned, that the child was under 18 years of age.

The defendant has the burden of proving by clear and convincing evidence-that is, that it is highly probable-that the defendant did not know and could not reasonably have learned that [name of victim] was under 18 years of age. Proof by clear and convincing evidence is a lower standard of proof than proof beyond a reasonable doubt.

If you find by clear and convincing evidence that the defendant did not know and could not reasonably have learned that the child was under 18 years of age, you must find the defendant not guilty of the charge of sexual exploitation of a child.

Comment

Although ~~the statute~~18 U.S.C. § 2251 is silent on whether reasonable mistake of age may serve as an affirmative defense, the Ninth Circuit has held that the defense is required by the First Amendment. United States v. United States District Court, 858 F.2d 534, 540-42 (9th Cir. 1988). The defendant must establish this defense by clear and convincing evidence. Id. at 543.

8.188 SALE OR RECEIPT OF
STOLEN VEHICLE, VESSEL OR AIRCRAFT
(18 U.S.C. § 2313)

The defendant is charged in [Count _____ of] the indictment with [receiving] [possessing] [concealing] [storing] [bartering] [selling] [disposing of] a stolen [motor vehicle] [vessel] [aircraft] in violation of Section 2313 of Title 18 of the United States Code. In order 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 [motor vehicle] [vessel] [aircraft] was stolen;

Second, after being stolen, the [motor vehicle] [vessel] [aircraft] was transported in [interstate] [foreign] commerce, meaning between [one state and another] [a foreign nation and the United States];

Third, the defendant [received] [possessed] [concealed] [stored] [bartered] [sold] [disposed of] the [motor vehicle] [vessel] [aircraft] while it was in [interstate] [foreign] commerce; and

Fourth, the defendant knew that the [motor vehicle] [vessel] [aircraft] was stolen at the time [he] [she] acted.

The government need not prove the defendant knew the property was in [interstate] [foreign] commerce; it need only prove the defendant knew it was stolen.

Something enters [interstate] [foreign] commerce when its transportation begins in one [state] [country] and is intended to continue into another. Property does not continue to be in [interstate] [foreign] commerce indefinitely. It ordinarily ceases to be in [interstate] [foreign] commerce when delivered to its final destination, unless it is being held there for some improper purpose, such as disguising its nature as stolen property or preparing it for re-sale as legitimate property.

Comment

An instruction which used the elements in this instruction, but compressed the first and second elements into a single element was approved in United States v. Henderson, 721 F.2d 662, 666 n.3 (9th Cir. 1983). ~~Defendant's~~The defendant's knowledge that the stolen property was in interstate commerce is not an element of the offense. Id. The four-element format is derived from United States v. Albuquerque, 538 F.2d 277, 278 (9th Cir. 1976) (stating elements of transporting a stolen motor vehicle in interstate commerce).

Whether property is in interstate commerce is a fact for the jury to determine under all of the circumstances. Henderson, 721 F.2d at 666.

The time a stolen object remains in the destination state may indicate it has left interstate commerce, but other factors may negate this inference. ~~For example, if a stolen item is concealed so that it may "cool off," the concealment is an integral part of the movement in interstate commerce rather than a break in it.~~

Approved 1/2019

~~United States v.~~ ~~Tobin, 576 F.2d 687, 693 (5th Cir. 1978).~~

8.191 TRANSPORTATION OR ATTEMPTED TRANSPORTATION FOR PROSTITUTION
(18 U.S.C. § 2421)

The defendant is charged in [Count _____ of] the indictment with [transporting] [attempting to transport] a person with intent that the person engage in prostitution in violation of Section 2421 of Title 18 of the United States Code. In order 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 knowingly [transported] [attempted to transport] a person in [interstate] [foreign] commerce; [and]

Second, the defendant [transported] [attempted to transport] a person with the intent that such person engage in [prostitution] [any sexual activity for which a person can be charged with a criminal offense][.] [; and]

[Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

~~For an attempt to commit~~ The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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~~ 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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

8.192 PERSUADING OR COERCING TO TRAVEL TO ENGAGE IN PROSTITUTION (18 U.S.C. § 2422(a))

The defendant is charged in [Count _____ of] the indictment with [persuading] [inducing] [enticing] [coercing] travel to engage in prostitution in violation of Section 2422 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove beyond a reasonable doubt:

[That, the defendant knowingly [persuaded] [induced] [enticed] [coerced] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [in any sexual activity for which any person can be charged with a criminal offense].]

or

[First, the defendant knowingly attempted to [persuade] [induce] [entice] [coerce] an individual to travel in [interstate] [foreign] commerce to engage in [prostitution] [any sexual activity for which any person can be charged with a criminal offense]; and

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

Both 18 U.S.C. § 2422(a) and (b) use the common terms "persuade," "induce," and "entice." Those terms "have plain and ordinary meanings within the statute, and [a] court [has] no obligation to provide further definitions." See United States v. Dhingra, 371 F.3d 557, 567 (9th Cir. 2004) (Dhingra involved a prosecution under 18 U.S.C. § 2422(b)).

The fact that women desired to leave Russia and travel to the United States did not preclude the finding that defendant persuaded, induced, enticed or coerced them to do so. United States v. Rashkovski, 301 F.3d 1133, 1136-37 (9th Cir. 2002). The statutory language does not require defendant to "have created out of whole cloth the women's desire to go to the United States; it merely requires that he have convinced or influenced [them] to actually undergo the journey, or made the possibility more appealing." Id. "[I]t is the defendant's intent that forms the basis for his criminal liability, not the victims'." Id. at 1137.

~~For an attempt to commit~~ The bracketed language stating alternative elements applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~crime, jurors~~ 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).

~~Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

~~The "strongly corroborates" language is taken from United States v.~~ "[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).
~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~1/2019

8.193 TRANSPORTATION OF MINOR
FOR PROSTITUTION
(18 U.S.C. § 2423~~)~~(a))

The defendant is charged in [Count _____ of] the indictment with transporting a minor with intent that [he] [she] engage in prostitution in violation of Section 2423(a) of Title 18 of the United States Code. In order 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 knowingly transported [name of victim] from _____ to _____;

Second, the defendant did so with the intent that [name of victim] engage in prostitution; and

Third, [name of victim] was under the age of eighteen years at the time.

Comment

It is not a defense to the crime of transporting a minor for purposes of prostitution that the defendant was ignorant of the child's age. ~~See~~ United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001). "If someone knowingly transports a person for the purposes of prostitution or another sex offense, the transporter assumes the risk that the victim is a minor, regardless of what the victim says or how the victim appears~~.~~." Id.

Approved ~~9/2017~~1/2019

8.194 FAILURE TO APPEAR
(18 U.S.C. § 3146(a)(1))

The defendant is charged in [Count _____ of] the indictment with failure to appear in violation of Section 3146(a)(1) of Title 18 of the United States Code. In order 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 was released from custody ~~with~~under the ~~requirement~~ Bail Reform Act;

Second, the defendant was required to appear in court or before a judicial officer on [date];

~~Second~~Third, the defendant knew of this required appearance; and

~~Third~~Fourth, the defendant intentionally failed to appear as required.

Comment

If the defendant becomes a fugitive prior to the hearing, the defendant's release is no longer pursuant to the ~~statute.~~Bail Reform Act, and the defendant thus may not be convicted under § 3146(a). United States v. Castaldo, 636 F.2d 1169, 1172 (9th Cir. 1980). ~~But see~~ Vacating a hearing prior to its occurrence precludes satisfaction of the second element because the defendant is no longer "under . . . order to appear on any date certain"; this rule applies even where the hearing is vacated because the defendant has failed to appear at prior hearings. United States v. ~~Daniel, 667~~Fisher, 137 F.~~2d 783~~3d 1158, 1163 (9th Cir. ~~1982).~~1998).

"When a defendant engages in a course of conduct designed to avoid notice of his trial date, the government is not required to prove the defendant's actual knowledge of that date." Weaver v. United States, 37 F.3d 1411, 1413 (9th Cir. 1994).

"A deliberate decision to disobey the law . . . cannot be found beyond a reasonable doubt merely from nonappearance and notice of obligation to appear." United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

Approved 1/2019

8.195 FAILURE TO SURRENDER
(18 U.S.C. § 3146(a)(2))

The defendant is charged in [Count _____ of] the indictment with failure to surrender in violation of Section 3146(a)(2) of Title 18 of the United States Code. In order 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 was sentenced to a term of imprisonment;

Second, the defendant was released from custody under the Bail Reform Act;

Third, the defendant was ordered to surrender for service of the sentence on [date];

~~Third~~Fourth, the defendant knew of the order to surrender; and

~~Fourth~~Fifth, the defendant intentionally failed to surrender as ordered.

Comment

See Comment to Instruction 8.194 (Failure to Appear~~).~~ (18 U.S.C. § 3146(a)(1))).

Approved 1/2019

9.1 ALIEN-BRINGING OR ATTEMPTING TO BRING TO THE UNITED STATES (OTHER THAN DESIGNATED PLACE) (8 U.S.C. § 1324(a)(1)(A)(i))

The defendant is charged in [Count _____ of] the indictment with [bringing] [attempting to bring] an alien to the United States in violation of Section 1324(a)(1)(A)(i) of Title 8 of the United States Code. In order 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 [brought] [attempted to bring] a person who was an alien to the United States at a place other than a designated port of entry or at a place other than as designated by a United States immigration official;

Second, the defendant knew that the person was an alien; [and]

Third, the defendant acted with the intent to violate the United States immigration laws by assisting that person to enter the United States at a time or place other than as designated by a United States immigration official[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing a crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

Bringing an alien to the United States does not require that the alien be free from official restraint as is required for offenses under 8 U.S.C. § 1326 for aliens illegally reentering or being found in the United States. United States v. Lopez, 484 F.3d 1186, 1193 (9th Cir. 2007); United States v. Hernandez-Garcia, 284 F.3d 1135, 1137-38 (9th Cir.), cert. denied, 537 U.S. 932 (2002); see also Comment to Instruction 9.6 (Alien-Deported Alien Reentering United States Without Consent).

The offense of bringing an alien to the United States is a continuing offense; "although all of the elements of the 'bringing to' offense are satisfied once the aliens cross the border, the crime does not

terminate until the initial transporter who brings the aliens to the United States ceases to transport them-in other words, the offense continues until the initial transporter drops off the aliens on the U.S. side of the border." Lopez, 484 F.3d at 1187-88. Thereafter, the offense is illegal "transport within" the United States, 8 U.S.C. § 1324(a)(1)(A)(ii). Id. at 1194-98. Lopez overrules United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001) (applying immediate destination analysis of whether the alien had reached the ultimate or intended destination within the United States); United States v. Angwin, 271 F.3d 786, 271 F.3d 786 (9th Cir. 2001) (same)). Lopez at 1191.

Aiding and abetting, involving a state-side transporter, requires proof of the specific intent to facilitate the commission of the "bringing to" offense and evidence that the state-side transporter involved himself in the bringing to offense prior to its completion. See United States v. Singh, 532 F.3d 1053, 1057-59 (9th Cir. 2008).

Statutory maximum sentences under § 1324 are increased for offenses causing serious bodily injury, placing the life of any person in jeopardy, or resulting in the death of a person. In such cases, a special jury finding is required.

An alien is also defined as being a person who is not a national. In the rare event that there is an issue as to the alien being a national, the definition of alien in the last paragraph of the instruction should be modified accordingly. See 8 U.S.C. § 1101(a)(22); Perdomo-Padilla v. Ashcroft, 333 F.3d 964, 967-68 (9th Cir. 2003); United States v. Sotelo, 109 F.3d 1446, 1447-1448 (9th Cir. 1997).

~~For an attempt to commit 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. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~

1/2019

9.2 ALIEN-ILLEGAL TRANSPORTATION OR ATTEMPTED TRANSPORTATION

(8 U.S.C. § 1324(a)(1)(A)(ii))

The defendant is charged in [Count _____ of] the indictment with [attempted] illegal transportation of an alien in violation of Section 1324(a)(1)(A)(ii) of Title 8 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [name of alien] was an alien;

Second, [name of alien] was not lawfully in the United States;

Third, the defendant [knew] [acted in reckless disregard of the fact] that [name of alien] was not lawfully in the United States; [and]

Fourth, the defendant knowingly [transported or moved] [attempted to transport or move] [name of alien] in order to help [him] [her] remain in the United States illegally[.] [; and]

[Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

An alien is a person who is not a natural-born or naturalized citizen of the United States. An alien is not lawfully in this country if the person was not duly admitted by an Immigration Officer.

A person acts with reckless disregard if: (1) the person is aware of facts from which a reasonable inference could be drawn that the alleged alien was in fact an alien in the United States unlawfully; and (2) the person actually draws that inference.

Comment

See Comment to Instruction 9.1 (Alien-Bringing to the United States (Other than Designated Place)).

"Reckless disregard" is not defined in Title 8, United States Code, but the Ninth Circuit has clarified that "reckless disregard" includes both an objective prong and a subjective prong. United States v. Rodriguez, 880 F.3d 1151, 1161 (9th Cir. 2018) ("a correct definition of

'reckless disregard,' consistent with Supreme Court and Ninth Circuit law, would include the defendant's disregard of a risk of harm of which the defendant is aware.") (internal brackets omitted).

Statutory maximum sentences under § 1324 are increased for offenses done for commercial advantage or private financial gain, or which caused serious bodily injury, placed the life of any person in jeopardy, or resulted in the death of a person. In such cases, a special jury finding is required.

~~For an attempt to commit 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. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

If the defendant is charged with transportation of illegal aliens resulting in deaths under 8 U.S.C. § 1324(a)(1)(A)(ii) and (a)(1)(B)(iv), the government must proves beyond a reasonable doubt that the defendant's conduct was the proximate cause of the charged deaths. United States v. Pineda-Doval,614 F.3d 1019, 1026-28 (9th Cir. 2010). In such cases, the instruction should be modified to instruct on the proximate cause element of "resulting in death."

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

~~For an attempt to commit~~
The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~crime, jurors~~ 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).

~~The "strongly corroborates" language is taken from United States v.~~ "[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).
~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

Approved ~~3/2018~~
1/2019

Note: this instruction is under review in light of United States v. Sineneng-Smith, No. 15-10614, 2018 WL 6314287 (9th Cir. Dec. 4, 2018).

9.5 ALIEN-BRINGING OR ATTEMPTING TO BRING
TO THE UNITED STATES
(WITHOUT AUTHORIZATION)
(8 U.S.C. § 1324(a)(2)(B)(i)-(iii)

The defendant is charged in [Count _____ of] the indictment with [bringing] [attempting to bring] an alien to the United States [knowing] [in reckless disregard of the fact] that the alien has not received prior official authorization to [come to] [enter] [reside in] the United States. In order 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 [brought] [attempted to bring] a person who was an alien to the United States [[for the purpose of the defendant's [commercial advantage] [private gain]] [and upon arrival did not immediately bring and present the alien to an appropriate immigration official at a designated port of entry] [with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year];

Second, the defendant [knew] [was in reckless disregard of the fact] that the person was an alien who had not received prior official authorization to [come to] [enter] [reside in] the United States; [and]

Third, the defendant acted with the intent to violate the United States immigration laws[.] [; and]

[Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

An alien is a person who is not a natural-born or naturalized citizen of the United States.

Comment

See Comment to Instructions 9.1 (Alien-Bringing to the United States (Other than Designated Place)) for aiding and abetting and bringing to the United States and 9.2 (Alien-Illegal Transportation) for "reckless disregard."

This is a separate crime from 8 U.S.C. § 1324(a)(1)(A)(i) (as to that statutory provision, see Instruction 9.1). Nevertheless, the two

crimes share the same elements. Both require that the alien lack prior authorization to enter the United States, but Section 1324(a)(1)(A)(i) requires that the entry be at a place not designated as a port of entry. United States v. Barajas-Montiel, 185 F.3d 947, 951 (9th Cir. 1999).

The instruction should be modified to reflect which subsection in Section 1324(a)(2)(B) is charged: (i) an offense committed with the intent or with reason to believe that the alien will commit an offense against the United States or any state punishable by imprisonment for more than one year; (ii) an offense done for the purpose of commercial advantage or private financial gain or (iii) an offense in which the alien is not upon arrival immediately brought to an appropriate immigration official at a designated port of entry.

Commercial advantage or financial gain may be established under either the theory that, as a principal, the defendant acted for his own commercial advantage or financial gain or under the theory that he aided another individual in committing the crime for a pecuniary motive. United States v. Lopez-Martinez, 543 F.3d 509, 515-16 (9th Cir. 2008); United States v. Munoz, 412 F.3d 1043, 1046-47 (9th Cir. 2005); United States v. Tsai, 282 F.3d 690, 697 (9th Cir. 2002). If the theory of liability is aiding and abetting, the jury need not find that the defendant committed the offense for his own financial advantage. It is enough that the offense was committed for the purpose of commercial advantage and financial gain of another. Lopez-Martinez, 543 F.3d at 515-16. If the defendant is charged with aiding and abetting instead of as a principal, modify the first element by deleting the words "the defendant's" to reflect the offense was done "for the purpose of [commercial advantage] [private financial gain]."

Statutory maximum sentences are increased for offenses involving groups of aliens in excess of 10. 8 U.S.C. § 1324(c). In such cases, a special jury finding is required.

See Barajas-Montiel, 185 F.3d at 951-53 (holding that criminal intent is required for felony convictions under 8 U.S.C. § 1324(a) (1) and (2)(B), as distinguished from a misdemeanor offense under § 1324(a)(2)(A), where Congress eliminated mens rea requirement if illegal alien is brought to the United States and taken directly to INS official at a designated port of entry). This instruction may be used for a misdemeanor charge by excluding the felonies described in § 1324(a)(2)(B)(i), (ii) and (iii) in the first element and omitting the third element.

~~For an attempt to commit 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. United States v. Hofus, 598 F.3d 1171, 1176 (9th Cir. 2010).~~

The bracketed language stating an additional element applies only when the charge is an attempt. In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

9.17 CONTROLLED SUBSTANCE-
ATTEMPTED POSSESSION WITH
INTENT TO DISTRIBUTE
(21 U.S.C. §§ 841(a)(1) and 846)

The defendant is charged in [Count _____ of] the indictment with attempted possession of [specify controlled substance] with intent to distribute in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code. In order 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 intended to possess [specify controlled substance] with the intent to distribute it to another person; and

Second, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward committing the crime. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

To "possess with the intent to distribute" means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance-Possession with Intent to Distribute) and 9.16 (Determining Amount of Controlled Substance). See United States v. Morales-Perez, 467 F.3d 1219, 1222 (9th Cir. 2006) (citing United States v. Davis, 960 F.2d 820, 826-27 (9th Cir. 1992)); United States v. Esquivel-Ortega, 484 F.3d 1221, 1228 (9th Cir. 2007) (citing to United States v. Estrada-Macias, 218 F.3d 1064, 1066 (9th Cir. 2000) (jury instruction requiring the government to prove that defendants knowingly associated themselves with the crime and were not mere spectators)).

The Ninth Circuit has stated, in a case in which the defendant pleaded guilty to attempted possession of a controlled substance with the intent to distribute, in violation of § 841(a), and the government sought a sentence under the heightened penalty provisions of § 841(b) based on type and quantity, that the government was required to prove the defendant's intent to possess a particular controlled substance. United States v. Hunt, 656 F.3d 906, 912-13 (9th Cir. 2011). By contrast, in a case in which the defendant pleaded guilty to actual importation of a controlled substance with the intent to distribute, in violation of § 960(a) (an analogous statute to § 841(a)), the court held that "the

government need not prove that the defendant knew the precise type or quantity of drug he imported" for the heightened penalties based on drug type and quantity to apply. United States v. Jefferson, 791 F.3d 1013, 1019 (9th Cir. 2015); see also United States v. Carranza, 289 F.3d 634, 644 (9th Cir. 2002) ("A defendant charged with importing or possessing a drug is not required to know the type and amount of drug."). The Committee believes that there may be tension between Hunt and Jefferson on the issue of a defendant's knowledge or intent regarding drug type and quantity. At least one district judge has limited the holding in Hunt to attempt crimes. See United States v. Rivera, No. 10-cr-3310-BTM, 2014 WL 3896041, at *2 (S.D. Cal., Aug. 7, 2014).

~~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).~~

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug
schedules-regardless of whether he knew the particular identity of the substance-or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

"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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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).

Approved ~~3/2018~~1/2019

9.20 CONTROLLED SUBSTANCE-
ATTEMPTED DISTRIBUTION OR MANUFACTURE
(21 U.S.C. §§ 841(a)(1) and 846)

The defendant is charged in [Count _____ of] the indictment with attempted [distribution] [manufacture] of [specify controlled substance] in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code. In order 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 intended to [[distribute [specify controlled substance] to another person]] [[manufacture [specify controlled substance]];

Second, the defendant knew that it was [specify controlled substance] or some other federally controlled substance; and

Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward the commission of the crime of [distribution] [manufacture] of [specify controlled substance]. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

["To distribute" means to deliver or transfer possession of [specify controlled substance] to another person, with or without any financial interest in that transaction.]

Comment

See Comment to Instructions 9.15 (Controlled Substance-Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.18 (Controlled Substance-Distribution or Manufacture).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules-regardless of whether he knew the particular identity of the substance-or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

~~Jurors do not need to agree unanimously as to which particular act or actions constituted~~

"To constitute a substantial step ~~toward~~, a defendant's actions must cross the ~~commission of a~~ line between preparation and attempt by unequivocally demonstrating that the crime~~.~~ will take place unless interrupted by independent circumstances." United States v. ~~Hofus, 598~~Goetzke, 494 F.3d ~~1171, 1176~~1231, 1237 (9th Cir. ~~2010).~~

~~Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules regardless of whether he knew the particular identity of the substance or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.~~2007) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

9.22 CONTROLLED SUBSTANCE-
ATTEMPTED DISTRIBUTION TO PERSON
UNDER 21 YEARS
(21 U.S.C. §§ 841(a)(1), 846 and 859)

The defendant is charged in [Count _____ of] the indictment with attempted distribution of [specify controlled substance] to a person under the age of twenty-one years in violation of Sections 841(a)(1), 846 and 859 of Title 21 of the United States Code. In order 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 intended to distribute [specify controlled substance] to [name of underage person];

Second, the defendant knew that it was [specify controlled substance] or some other federally controlled substance;

Third, the defendant was at least eighteen years of age;

Fourth, [name of underage person] was under the age of twenty-one years; and

Fifth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [specify controlled substance] to a person under the age of twenty-one years. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

"Distribution" means delivery or transfer of possession of [specify controlled substance] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance-Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.21 (Controlled Substance-Distribution to Person Under 21 Years).

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug

schedules-regardless of whether he knew the particular identity of the substance-or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

~~Jurors do not need to agree unanimously as to which particular act or actions constituted~~"To constitute a substantial step ~~toward~~, a defendant's actions must cross the ~~commission of a~~ line between preparation and attempt by unequivocally demonstrating that the crime~~.~~ will take place unless interrupted by independent circumstances." United States v. ~~Hofus, 598~~Goetzke, 494 F.3d ~~1171, 1176~~1231, 1237 (9th Cir. ~~2010).~~

~~Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules regardless of whether he knew the particular identity of the substance or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.~~
2007) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

9.24 CONTROLLED SUBSTANCE-
ATTEMPTED DISTRIBUTION IN OR
NEAR SCHOOL
(21 U.S.C. §§ 841(a)(1), 846 and 860)

The defendant is charged in [Count _____ of] the indictment with attempted distribution of [specify controlled substance] within 1,000 feet of the [schoolyard] [campus] of a [school] [college] [university] in violation of Sections 841(a)(1), 846 and 860 of Title 21 of the United States Code. In order 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 intended to distribute [specify controlled substance] to another person in, on, or within 1,000 feet of the [schoolyard] [campus] of [name of school];

Second, the defendant knew that it was [specify controlled substance] or some other federally controlled substance; and

Third, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward the commission of the crime of distribution of [specify controlled substance] in or near a school. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances

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

"Distribution" means delivery or transfer of possession of [specify controlled substance] to another person, with or without any financial interest in that transaction.

Comment

See Comment to Instructions 9.15 (Controlled Substance-Possession with Intent to Distribute), 9.16 (Determining Amount of Controlled Substance) and 9.23 (Controlled Substance-Distribution In or Near a School).

~~Jurors do not need to agree unanimously~~Regarding cases involving a "controlled substance analogue" as ~~to which~~it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug schedules-regardless of whether he knew the particular ~~act or actions constituted~~identity of the substance-or "that the defendant knew the

specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

"To constitute a substantial step ~~toward the commission of a ~~, 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. ~~Hofus, 598~~Goetzke, 494 F.3d ~~1171, 1176~~1231, 1237 (9th Cir. ~~2010).~~

~~Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug~~

~~schedules regardless of whether he knew the particular identity of the substance or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.~~

2007) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

9.26 CONTROLLED SUBSTANCE-
ATTEMPTED EMPLOYMENT OF
MINOR TO VIOLATE DRUG LAWS
(21 U.S.C. §§ 841(a)(1), 846 and 861(a)(1))

The defendant is charged in [Count _____ of] the indictment with attempted employment of a minor to [specify drug law violation] in violation of Sections 841(a)(1), 846 and 861(a)(1) of Title 21 of the United States Code. In order 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 intended to [[hire] [use] [persuade] [coerce] [induce] [entice] [employ]] [name of minor] to [specify drug law violation and controlled substance];

Second, the defendant was at least eighteen years of age;

Third, [name of minor] was under the age of eighteen years; and

Fourth, the defendant did something that was a substantial step toward committing the crime and that strongly corroborated the defendant's intent to commit the crime.

Mere preparation is not a substantial step toward the commission of the crime of [hiring] [using] a minor to violate the drug laws. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

See Comment to Instruction 9.25 (Controlled Substance-Employment of Minor to Violate Drug Law).

~~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).~~

Regarding cases involving a "controlled substance analogue" as it is defined in 21 U.S.C. § 802(32)(A), the Supreme Court held in McFadden v. United States, 135 S. Ct. 2298 (2015), that, in order to prove the knowledge element, the government must prove that either the defendant knew that the substance distributed is treated as a drug listed on the federal drug
schedules-regardless of whether he knew the particular identity of the substance-or "that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." Id. at 2305.

"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) (internal quotations omitted).

The "strongly ~~corroborates~~corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

"[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).

Approved ~~3/2018~~1/2019

9.43 FORCIBLE OR ATTEMPTED RESCUE OF SEIZED PROPERTY
(26 U.S.C. § 7212(b))

The defendant is charged in [Count _____ of] the indictment with [forcibly rescuing] [attempting to rescue forcibly] seized property in violation of Section 7212(b) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, [specify property] was seized as authorized by the Internal Revenue Code;

Second, the defendant knew that the property had been seized as authorized by the Internal Revenue Code; and

Third, the defendant [forcibly retook] [caused to be retaken forcibly] [attempted to retake forcibly] the property without the consent of the United States.

"Forcibly" is not limited to force against persons, but includes any force that enables the defendant to retake the seized property.

[A defendant "attempts to retake" seized property when that defendant does something that is a substantial step toward retaking the property and that strongly corroborates the defendant's intent to do so.

Mere preparation is not a substantial step toward the commission of attempting to rescue seized property. To constitute a substantial step, a defendant's act or actions must demonstrate that the crime will take place unless interrupted by independent circumstances.

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

In attempt cases, "[t]o 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) (internal quotations omitted).

The "strongly corroborated" language in this instruction is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).

~~The "strongly corroborates" language is taken from United States v. Snell, 627 F.2d 186, 187 (9th Cir. 1980) ("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).~~

"[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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